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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellant*

v.

UNITED STATES OF AMERICA

No. 73

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On Appeal From the United States District Court for the District of Columbia

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BRIEF FOR THE MARYLAND AND VIRGINA MILK PRODUCERS ASSOCIATION, INC.

OPINIONS BELOW

The opinions of the United States District Court for the District of Columbia, rendered on October 16,

1958 (R. 121), November 21, 1958 (R. 480) and January 14, 1959 (R. 504), are reported at 167 F. Supp. 45, 167 F. Supp. 799, and 168 F. Supp. 880.

JURISDICTION

The judgments of the district court were entered on November 10, 1958 (R. 74), January 22, 1959 (R. 85) and January 30, 1959 (R. 88), and became final on the latter date. Fed. R. Civ. P., Rule 54(b). Notices of appeal were filed in the district court by the Maryland and Virginia Milk Producers Association on March 11, 1959 (R. 89), and by the United States on March 23, 1959 (R. 92). On June 29, 1959, this Court noted probable jurisdiction and consolidated the appeals (R. 746). 360 U.S. 927. The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. § 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

STATUTES INVOLVED

The statutes pertinent to these appeals are Sections 2 and 3 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 2, 3), Sections 6 and 7 of the Clayton Act (Act of October 15, 1914, 38 Stat. 730, as amended, 15 U.S.C. §§ 17, 18) and the Capper-Volstead Act (Act of February 18, 1922, 42 Stat. 388, 7 U.S.C. §§ 291, 292). These statutes are set forth in the Appendix, pp. 2a-6a.

QUESTION PRESENTED

Whether an agricultural cooperative, meeting the requirements of Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act and not acting

in combination or conspiracy with outsiders, is subject to original prosecution by the Department of Justice

(a) under Section 2 of the Sherman Act for monopolization or attempts to monopolize trade and commerce in the marketing of its members' product;

(b) under Section 7 of the Clayton Act for acquiring, with the proscribed effects, the assets of a dealer outlet for handling and marketing its members' product;

(c) under Section 3 of the Sherman Act for entering into the contract to acquire those assets from an outsider.[1]

STATEMENT

These cases arise on appeals from three decisions of the district court (1) granting exemption to an agricultural cooperative association from prosecution under Section 2 of the Sherman Act, but (2) denying exemption and entering judgment against the cooperative for acquiring assets in violation of Section 7 of the Clayton Act, and (3) holding that the contract by which the acquisition was made was a transaction in violation of Section 3 of the Sherman Act. The record discloses that the cooperative, not acting in combination or conspiracy with others, engaged in activities which restricted the free interplay of competitive forces in the marketing of its agricultural product. For the purpose of these appeals it is assumed that such activities would violate the antitrust laws but for the fact that the defendant is a congressionally authorized cooperative association of farmers. The central question posed, therefore, is how far federal

[1] An additional question as to the propriety of relief granted by the District Court is raised by the United States in its appeal in No. 73, and will be dealt with in our answering brief.

legislation dealing specially with agriculture and agricultural cooperatives has limited the applicability of the antitrust laws. Consideration of this question requires an understanding of the extent to which the authorized purposes and functions of a farmer cooperative inherently contradict the basic principles of competition.

The Maryland and Virginia Milk Producers Association, Inc. (hereinafter referred to as the Association) is a cooperative organization of nearly 2000 dairymen whose farms produce milk for the Washington metropolitan area (R. 123). As such, it was found by the district court to be an agricultural organization fully complying with the standards set forth in the exemption provisions of Section 6 of the Clayton Act (R. 125). It was "instituted for the purposes of mutual help because it acts as the marketing agency for all of its members and pays over to its members the proceeds of the milk sales, with a deduction, of course, for overhead and similar expenses." It does not have capital stock and is not conducted for profit, apart from that which accrues to its members. The Association was also found to meet the tests of an agricultural association as defined in Section 1 of the Capper-Volstead Act (R. 125-6). It is operated for the mutual benefit of its members, all of whom are farmers or dairymen and none of whom is allowed more than one vote. It does not deal in the products of nonmembers to an amount greater in value than is handled by it for members (R. 126). As such it is fully qualified, in the words of the statute, to engage in "collectively processing, preparing for market, handling, and marketing" milk, and to "make the necessary contracts

and agreements to effect such purposes" (R. 124; App. 4a-5a).

The history of the Association is set forth, as part of the affirmative antitrust case against it, in Government Exhibit 27 (R. 565-585; see also Def. Exh. 19, R. 692-717). This exhibit is a report of the Secretary of the Baltimore Bank for Cooperatives, an agency established under the Farm Credit Act of 1933 (12 U.S.C. § 1134 et seq.) for the express purpose of affording financial assistance to eligible farmer cooperatives in accordance with the policy and standards set forth in the Agricultural Marketing Act (12 U.S.C. § 1141 et seq.). According to the Bank's report, the Association was incorporated in 1920 in response to "a definite and pronounced economic need": "market insecurity—for the producer and the distributor" characterized by "generally chaotic conditions in the production and distribution of fluid milk for which there was a steadily increasing and stable demand," "needless price fluctuations," a "mal-distribution of surplus milk," and the "complete lack of bargaining power on the part of the producers" (R. 565). "Such conditions," the Bank's report observed, "are not conducive to the investment, labor, know-how, and business risks involved in the production of a dependable supply of high quality milk—and, therefore, are not in the best interests of the producer, the distributor, or the consumer" (R. 565-6). The Association's early efforts to create effective bargaining power through which producers could raise the level of prices received from dealers demonstrated that success hinged upon securing the membership of farmers producing a dominant share of the market's milk supply (R. 566, 568). By 1923 the Association through pooling

contracts had enlisted producers whose volume constituted over 85% of the market (R. 568). And by 1931, the Association had "reached a secure and formidable place in the market" (R. 569).

The operation of the cooperative is geared to the characteristics of its product. Milk, being a highly perishable commodity, must be moved promptly from the farm through processing plants to the consumer (R. 3, 28). And, typical of the agricultural economy, a surplus problem is created by the production of milk in excess of the market's fluid needs (R. 377). Seasonal fluctuations in the productivity of cows accentuate the problem. A milk producers' cooperative is designed to alleviate the disastrous effects upon price which competition among individual farmers would normally have on the sale of a highly perishable, surplus commodity. The cooperative gathers the farmers together, eliminates competition among them, and strives to create bargaining power by collectively marketing their product (R. 568). As marketing agent it seeks stable markets and outlets for members' milk (R. 570). It distributes the burden of surplus milk equitably among its members. By these means, it inherently and inevitably serves as an instrument for enhancing the price of milk above the level which competition would allow (R. 569).

For many years prior to 1954, the Association sold its members' milk only to dealers, or "handlers." It made no direct sales to consumers. The price which dealers paid for milk was determined according to a system known as the classified use plan. This system, prevalent in large milk markets throughout the country and typically prescribed in federal milk marketing

orders, fixes the price for milk of identical grade, quality and quantity according to the manner in which the milk is used. As summarized by the district court, the plan operated in the Washington market as follows (R. 485-6):

> For the purpose of determining the price to be charged to customers and the price to be paid by the Association to its members, the milk is divided into three categories. So much as is resold to the ultimate consumers in liquid form is placed in Class I; so much as is converted into cream or cottage cheese forms Class II; and the balance, known as surplus milk, which is transformed into other by-products, such as ice cream and powdered milk, is denominated Class III.
>
> The commodity in Class I and Class II is known in the trade as fluid milk.
>
> Different prices are charged to the customer for milk in each of the three groups, Class I receiving the highest and Class III receiving the lowest price.
>
> Since all milk delivered to the Association by its members forms a single pool, figuratively speaking, out of which all sales are made, it is impossible to allocate specific quantities to each of the three classes out of each member's contribution. Accordingly, a so-called blend price is ascertained on the basis of the proportions of total sales made by the Association in each class out of the aggregate amount sold during a specified period. The Association then pays its members on the basis of the blend price, after deducting a percentage, of course, for its maintenance and operating expenses.
>
> Manifestly, the more milk that can be sold in Class I and the less in Class III, the greater will be the blend price and the more profitable the returns to the members.

The variation in price between fluid milk and surplus milk is considerable: in mid-1954 milk sold for consumption in liquid form commanded a Class I price of $6.62 per hundredweight, while the Class II price was $3.10 per cwt. and the surplus milk in Class III sold for $2.75 per cwt. (R. 389). Fluctuations in the amount of milk which is surplus to fluid requirements can have a substantial impact on the average blend price received by members of the Association (R. 377-9; see also Gov. Exh. 115).[2]

The presence in the market of a strong cooperative benefits all producers, members and nonmembers, as well as consumers. Thus the blend price achieved through Association activities and received by its members is also the basis upon which the price paid by dealers to nonmember producers is calculated (R. 146, 377-8). Similarly, the Association's undertaking to manage the surplus problem by distributing the burden among its members benefits nonmember producers even though they do not share the cost of operating the cooperative. In fact the prosecution here conceded that independent producers "received returns equal to and in fact, better in many instances than did defendant's members since defendant's members were and are charged or assessed charges for the running of their organization" (R. 146). In addition, fluctuating market demand requires a large milk cooperative to maintain a reserve or surplus supply in order to cope with the market's peak requirements (R. 402).

Early in 1953, the Association's surplus began "increasing beyond the necessary margin" and became so

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[2] This Exhibit, a part of the record filed in this Court but not printed, is referred to pursuant to the Stipulation as to Printing of Record, part H, entered into by the parties on July 5, 1959.

excessive that "in a number of instances milk, or skim milk, went down the sewer" (R. 403). By the Spring of 1954, the surplus was having a "direct depressing effect" on the blend price (R. 377), adversely affecting Association members and nonmembers alike (R. 378). Between November 1953 and May 1954, the blend price dropped steadily from $5.30 to $4.32 (Gov. Exh. 115). The Association took several steps to raise the blend price by utilizing its surplus in other than the lowest price categories (R. 378). It instituted a vigorous advertising campaign to stimulate consumption of milk (R. 378). It purchased and distributed sixty vending machines to "capture a part of the impulse buying in the market." It tried to sell its surplus as fluid milk in other markets, such as North Carolina, South Carolina and North Dakota. It did not lower the Class I price because experience had shown that a decrease in the price of milk of as much as two cents a quart reduces enormously the returns to farmers (R. 379-80) but in terms of increased consumption "has no effect whatsoever on the buying habits of the public" (R. 379).

On April 9, 1954, the Association's Board of Directors voted "to study the advisability of applying for a Federal Marketing Order for the Washington Market" (Def. Exh. 22, R. 727; R. 382). Three days later, on April 12, William B. Hooper, Assistant Secretary of the Association, visited James J. Ward, President and owner of Embassy Dairy, Inc., "with the purpose of trying to sell him some of our surplus milk to use in his operations" (R. 382). Embassy at the time was the fourth largest dealer or handler in the market (R. 486). It purchased virtually none of its milk from the Association, sold slightly under 10% of the fluid milk bought by consumers, and obtained a large share

of the sales to federal installations by cutting prices (R. 487). Ward declined to purchase milk from the Association on the terms on which it was sold to other dealers (R. 383), but suggested that the Association buy him out (R. 384). Two days later, at a special meeting called for that purpose (R. 384), the Association's Board of Directors voted to give favorable consideration to Ward's proposal (Def. Exh. 23, R. 729). Its decision was based upon the benefit in added income which would accrue to dairy farmers from moving Class III or surplus milk into Class I or fluid channels (R. 356-7; R. 402-3).

In order to arrange financing for the purchase of Embassy the Association promptly contacted the Baltimore Bank for Cooperatives (Gov. Exh. 24, R. 554; Gov. Exh. 25, R. 556), which is authorized by law to make loans to cooperatives for "the construction or acquisition . . . of physical facilities." 12 U.S.C. § 1141e(a)(2). Full disclosure of the competitive impact of the acquisition was made by the Association to Bank representatives (Gov. Exh. 24-27, R. 554-585). After the Bank's approval of the loan appeared to be assured (Gov. Exh. 26, R. 560), the Association on May 26, 1954, entered into an agreement to purchase Embassy (Gov. Exh. 29, R. 586). In recommending that the Association's loan application be granted, the Report of the Bank's Secretary to its Executive Committee (Gov. Exh. 27, R. 565) stated that the Association wanted to buy Embassy so as "to rid the market of an unstable influence" and "to acquire an additional outlet" for surplus milk (R. 574). The Bank had previously been advised that the Association's only alternatives for eliminating market instability were to buy Embassy or apply for a federal order (Gov. Exh. 25, R. 557).

The Bank's report on the economic desirability of the acquisition relied in part upon an analysis of the acquisition which it had requested from the Department of Agriculture (R. 408, 418, 576). That study, made by Donald E. Hirsch, Chief, Dairy Branch, Farmer Cooperative Service, United States Department of Agriculture, concluded that while the Association appeared to have minimized the problems and overemphasized the potential benefits of the transaction, "the cooperative has an unusual opportunity to increase average returns to members through purchase of the Embassy milk distributing business. The potential benefits arising from use in Class I and II of a higher proportion of members' milk appear to outweigh all probable disadvantages" (Def. Exh. 19, R. 717). With regard to Embassy's price-cutting reputation, Hirsch commented that a factor favoring the acquisition was that if "it can keep current customers without granting these special discounts, the cooperative could increase the margin by obtaining higher resale prices" (R. 713). On the basis of these recommendations the Bank, on June 23, 1954, reciting that "the findings required by law having been duly made," executed a loan agreement under which the Association was to receive $2,100,000 with which to purchase Embassy (Gov. Exh. 114, R. 659). The findings which the Agricultural Marketing Act require are that the loan will be "in furtherance of the policy declared in Section 1141." That Section declares it to be the policy of Congress to promote the merchandising of agricultural commodities by, among other things,

> (3) . . . promoting the establishment and financing of a farm marketing system of producer-owned

and producer-controlled cooperative associations and other agencies

and

(4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity. 12 U.S.C. § 1141(a)(3) and (4).

On July 26, 1954, the Association consummated the acquisition of substantially all of the Embassy assets (R. 490). Two months later, on October 11, 1954, counsel for the Association, knowing that the Antitrust Division of the Department of Justice was investigating its activities, including the Embassy purchase, directed a letter to Robert L. Farrington, Solicitor of the Department of Agriculture, calling attention to the conflict between antitrust and agricultural policies and requesting an investigation of the Association's conduct under the Capper-Volstead Act (Def. Exh. 64, R. 737). Under a formal delegation of authority, the responsibilities of the Secretary of Agriculture for initiating proceedings under the Capper-Volstead Act had been assigned to the Solicitor (R. 743-4). In response to the Association's letter, the Solicitor advised the Attorney General on December 10, 1954, that the Farmer Cooperative Service had, as required by law, afforded "some advisory assistance in evaluating the economic implications" of the acquisition, that the Department of Agriculture understood that "the purchase was made for the purpose of enabling the cooperative to gain better information regarding the retail market; to bargain more effectively; and to

serve its members more advantageously"; and that the Department had received no information indicating that the Association's activities in connection with Embassy violated the Capper-Volstead Act (Def. Exh. 65, R. 742).

On November 21, 1956, the Attorney General, without requesting the Secretary of Agriculture to proceed against the Association under the authority conferred by Section 2 of the Capper-Volstead Act (Def. Exh. 67, R. 745), filed this civil antitrust proceeding against the Association (R. 1). The complaint charged that through various anti-competitive practices, including the acquisition of Embassy (¶ 22d, R. 6; R. 40), the Association had attempted to monopolize and had monopolized trade and commerce in the supplying of raw milk to dealers for processing and resale as pasteurized fluid milk in the Washington metropolitan area, in violation of Section 2 of the Sherman Act (R. 5). The complaint further alleged that the "contract" under which the Association acquired the Embassy assets was made for the purpose of eliminating Embassy as an outlet for raw milk produced by others, and of eliminating competition between Embassy and dealers purchasing raw milk from the Association, in unreasonable restraint of trade and commerce in the Washington metropolitan area in violation of Sections 1 and 3 of the Sherman Act (R. 7-8). Finally, the Government asserted that the Association's acquisition of the Embassy assets had and might have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of raw milk to, and the distribution and sale of pasteurized fluid milk by, Washington metropolitan

area dealers, in violation of Section 7 of the Clayton Act (R. 8).

On February 7, 1957, the United States amended its complaint under Sections 1 and 3 of the Sherman Act so as to charge that the Embassy assets were purchased pursuant not merely to a "contract" but to "an unlawful combination and conspiracy" with the vendor and others to eliminate and foreclose competition in the Washington metropolitan area (R. 18-21). On December 10, 1957, the United States further amended its complaint to add the charge that the Association's acquisition of the so-called Richfield-Wakefield Dairy on December 7, 1957, violated Section 7 of the Clayton Act (R. 481).

The Association's answer claimed exemption from prosecution by virtue of the provisions of the Capper-Volstead Act and Section 6 of the Clayton Act (R. 31-33). When the case came on for trial in the Fall of 1958, the court ordered that the question of exemption be tried first (R. 121). On October 16, 1958, in the first of three opinions, the court ruled as a matter of law that the Clayton and Capper-Volstead Acts rendered the Association

> entirely exempt from the provisions of the antitrust laws, both as to its very existence and as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities (R. 131).

Applying this ruling to the allegations of the complaint, the district court dismissed the monopolization charges under Section 2 of the Sherman Act (R. 132). The court simultaneously sustained and ordered separate

trials of the charges that the Embassy acquisition violated Sections 1 and 3 of the Sherman Act and Section 7 of the Clayton Act (R. 133). The Sherman Act cause of action was sustained because it charged a "conspiracy" with outsiders (R. 132). The Clayton Act charge was upheld on the theory that Section 7 constitutes a "limitation of the authority of an agricultural cooperative to make contracts" (R. 133).

On November 21, 1958, the court ruled that the Association's acquisition of the Embassy assets violated Section 7 of the Clayton Act (R. 480). At the outset it noted, on the basis of this Court's decisions (R. 484),

> that the fact that all concerned acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company, and without any design to overreach anyone, does not defeat the right of the government to relief.

The court then proceeded to consider the facts solely as in an ordinary antitrust case, without reference to the defendant's special status as a cooperative. Starting with the Association's 86 per cent share of the market (R. 486), the court found that the acquisition "tended to lessen competition in the Washington market" (R. 491-2) in that it "diminished competition for the purchase of milk from producers," "reduced competition for sales to government establishments," and "tended to create a monopoly by concentrating a larger proportion of the milk supply . . . in the hands of the defendant" (R. 492). While the Association "did not achieve complete monopoly," the court said, the fact "that the defendant enhanced its dominating position in the market" was

sufficient to violate the Act (R. 492). In support of its ruling, the court relied on the Association's motives to secure the "elimination of bootlegging," to replace the "cheap uninspected 'distress' milk from other markets" with Association milk, to "increase . . . the blend price," to enlarge the membership of the Association, and to eliminate a "disturbing influence" from the market (R. 488-9). The fact that there was no enhancement of prices, i.e., that "milk prices in the area did not climb to a higher level subsequent to the transaction," was considered irrelevant by the trial judge because it was "within the realm of possibility that prices might have fallen" were it not for the acquisition (R. 493). And the fact that the acquisition was carried out with funds loaned by a "government financial institution" after the "favorable opinion" of the Department of Agriculture was deemed to be no defense (R. 493-4).

Accordingly, the court ruled that judgment should be rendered compelling the Association to divest itself of the Embassy assets and to cancel the contract ancillary to the acquisition (R. 494). At the same time it held the acquisition of the Richfield-Wakefield Dairy to be lawful under the "failing corporation" doctrine (R. 495).

On January 12, 1959, the court conducted a separate trial on the alleged combination and conspiracy under Sections 1 and 3 of the Sherman Act. By stipulation, both sides presented the case solely on the record of the prior hearings (R. 504). The prosecution offered no evidence that the Association had combined or conspired with any one to effect the Embassy acquisition. It relied solely on the contract of acquisition and the

ancillary covenant not to compete signed by the seller and by members of his family who benefited from the sale. The trial court on January 14, 1959, without any finding of combination or conspiracy, concluded that the "transaction" involving the acquisition of Embassy dairy constituted a violation of Section 3 of the Sherman Act (R. 506). On January 22, 1959, judgment was entered under both Section 7 and Section 3 (R. 85), and by judgment dated January 30, 1959, the court dismissed the complaint under Section 1 of the Sherman Act (R. 88).

SUMMARY OF ARGUMENT

The Capper-Volstead Act of 1922 establishes a federal charter for farmer cooperative activity. In Section 1, competing producers of agricultural products are authorized, without limitation, to combine in cooperative organizations. Such organizations may integrate vertically into all stages of processing and marketing products, have marketing agencies in common with other cooperatives, and make all contracts necessary to carrying out these purposes. The restraint of trade or potential for monopoly inherent in such anticompetitive combinations is recognized in Section 2. It prescribes a detailed procedure by which any cooperative (1) found by the Secretary of Agriculture to have monopolized or restrained trade "to such an extent that the price of any agricultural product is unduly enhanced," and (2) not obeying or appealing from the Secretary's order to cease and desist from monopolization or restraint of trade, is subject to (3) enforcement proceedings by the Department of Justice in district court where full antitrust equitable relief may be obtained.

The relationship between the Capper-Volstead Act and the antitrust laws has been examined by this Court only once. In *United States* v. *Borden*, 308 U.S. 188 (1939), it held that Capper-Volstead did not go so far as to exempt farmer combinations from antitrust prosecution when they participated in combinations or conspiracies with persons and corporations themselves subject to conventional antitrust standards. We believe that the *Borden* test of conspiracy with outsiders presents the only situation in which farmer cooperatives may be subjected to criminal or civil prosecution under the Sherman or Clayton Acts. A compelling legislative history, not heretofore examined in the context of a nonconspiracy case, discloses that Capper-Volstead was expressly designed to provide the exclusive method for proceeding against restrictive or monopolistic conduct by farmer cooperatives acting alone.

I. The Capper-Volstead Act was the product of pleas to halt the criminal prosecution of farmers. The antitrust exemption provided by Section 6 of the Clayton Act had proved to be inadequate. While the mere combination of competing producers was exempt from antitrust dissolution, the use by the combination of its economic power in the market was continually threatened with antitrust prosecution. E.g. *United States* v. *King*, 250 Fed. 908 (1916).

The legislative development of the Capper-Volstead Act shows that Congress had a dual purpose: to preclude direct Sherman Act prosecution of cooperatives and yet protect the public against the danger that farmer monopoly might raise prices too high. A study of the progress of the Act through two

Congresses discloses remarkable evidence that authorization of monopoly and the exclusivity of the Section 2 remedy were the precise issues considered and resolved.

Section 2 of the Act was carefully drafted to accommodate these purposes. Representative Volstead and Senator Capper revealed that it was modeled after provisions of the original Clayton and Federal Trade Commission Acts. Section 2 consolidated the ordinarily alternative procedures of (1) antitrust regulation by administrative agencies, typified by Section 11 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and (2) civil antitrust prosecution by the Department of Justice under Section 15 of the Clayton Act and Section 4 of the Sherman Act. These procedures were made consecutive rather than alternative in Capper-Volstead's control over farmer cooperatives. The Secretary of Agriculture was to determine whether a cooperative's monopoly or restraints of trade unduly enhanced prices; upon an affirmative finding, he was empowered to issue an order not against the high prices, but against the monopolization or restraints themselves. The Department of Justice was then to enforce the Secretary's order in district court where relief coextensive with that obtainable under the Sherman and Clayton Acts would be available.

The course through Congress of the bill so drafted revealed sharp controversy not over its meaning but as to its wisdom. The purpose was "not to exempt them and leave no remedy at all, but to exempt them and provide another tribunal." Accordingly, the bill "gives them a status of their own, fixes a different method of proceeding, and absolutely deprives the

court in the first instance, of examining into the question of whether or not they have violated the law." In the 66th Congress, opponents in the Senate added amendments to forbid monopoly and place cooperatives under the jurisdiction of the Federal Trade Commission instead of the Secretary of Agriculture. The House refused to concur. In the 67th Congress, the Senate Judiciary Committee struck out Section 2 in its entirety and proposed re-enacting Section 1 alone with an express antimonopoly amendment. During the extensive debate that followed, the desirability of denying the right of the Attorney General to proceed against farmer cooperative monopolies, particularly in milk, was at the heart of the debate. Supporters of the House bill, however, refused "to hold the sword and threat of the Sherman Act" over all farmers simply because a few commodities such as milk might be monopolized. In the end, the Senate overwhelmingly rejected its Judiciary Committee's antimonopoly amendment and refused to replace the Secretary of Agriculture by the Federal Trade Commission. The bill thereafter became law.

An interpretation of Section 2 of the Capper-Volstead Act as a mere alternative to ordinary antitrust prosecution would be a travesty against the purpose of the 67th Congress. Although Capper-Volstead was passed to protect farmers against criminal prosecution, it would be interpreted as if the purpose had been to punish them by imposing an additional enforcement scheme. Farmer cooperatives, under the government's theory, would be subject to three antitrust procedures: by the Federal Trade Commission, by the Department of Justice, and by the Secretary of Agriculture supplemented by the Department of Justice. Such an

interpretation not only contradicts purpose; it ascribes to Congress the enactment of a nullity. For if conventional antitrust proceedings are available against monopolizing cooperatives, recourse would never be had to a procedure by which Sherman Act relief would have to await prior proceedings by the Secretary of Agriculture and proof not only of monopolization but of undue enhancement of prices as well.

The exclusivity of the Capper-Volstead procedure was emphasized in the 1950 amendment to Section 7 of the Clayton Act. Apart from confining its asset acquisition prohibitions to corporations "subject to the jurisdiction of the Federal Trade Commission," the last paragraph of the amendment stated that nothing in Section 7 would apply to transactions consummated under statutory authority given by any of seven specialized agencies, including the Secretary of Agriculture. No federal statute confers express authority on the Secretary to give advance approval to acquisitions. But the legislative history of the Section 7 amendment is revealing. It shows that the original version of the amendment made no mention of the Secretary of Agriculture. But after hearings had brought out the impact of the bill on the acquisition of dairy plants by Capper-Volstead cooperatives, already subject to proceedings under Section 2 of that Act, the House Judiciary Committee amended the bill to include the Secretary of Agriculture. And House Report 1191 of the 81st Congress stated that the purpose of the last paragraph of Section 7 was simply to provide that the "bill should not apply to corporations coming under the jurisdiction" of the seven agencies because "there is no disposition to change the present arrangement regarding them."

The Capper-Volstead Act itself was thus considered by the authors of the Section 7 amendment to authorize acquisitions by those cooperatives which are subject to the jurisdiction of the Secretary of Agriculture. Moreover, it would make no sense for Section 7 of the Clayton Act, designed to forbid incipient violations of the Sherman Act, to outlaw the tendency to monopoly of a cooperative's vertical integration when, fully ripened, that monopoly would be exempt from the Sherman Act.

On the basis of the Capper-Volstead Act, interpreted as the 67th Congress intended, the government's complaint under Section 2 of the Sherman Act was properly dismissed, and under Section 7 of the Clayton Act should have been dismissed, upon the finding made by the district court that the lone defendant was a Capper-Volstead cooperative. And the charge that the assets of Embassy Dairy were acquired in violation of Sections 1 and 3 of the Sherman Act should have been dismissed upon the failure of evidence or finding as to any combination or conspiracy with outsiders.

II. Capper-Volstead's removal of farmer cooperatives from conventional antitrust procedures and competitive standards has been reinforced by subsequent actions of Congress. New laws and new agencies were created expressly to aid the farmer and his cooperatives in dealing with difficult competitive problems. In the Cooperative Marketing Act of 1926, the Agricultural Marketing Act of 1929, and the Agricultural Marketing Agreement Act of 1937, Congress has demonstrated its policy "to protect, control, and stabilize" the marketing of farm commodities, to control agricultural surpluses and prevent "undue or excessive fluctuations or depressions in prices," and to promote

the establishment of a farm marketing system by producer cooperatives. If farmers through their cooperatives and federations of cooperatives are unable to control competition, they may enlist the aid of the Secretary of Agriculture to fix minimum prices that "all handlers shall pay . . . for milk purchased from producers or associations of producers." Federal agencies, in turn, have persistently urged cooperatives to grow in size and market power, to eliminate the middleman by acquiring retail outlets, and to adopt classified use pricing systems in order to secure price stability.

Under classic antitrust doctrines the possession of monopoly power, purposefully acquired, is sufficient to violate the Sherman Act irrespective of whether prices are raised or competitors are actually excluded. *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *Aluminum Company of America* v. *United States*, 148 F. 2d 416 (2d Cir. 1945). Application of these conventional standards to farmer cooperatives would plainly subject them to criminal antitrust prosecutions for achieving or seeking the very market power which Capper-Volstead authorizes them to have and federal agencies have actively encouraged them to acquire. That antitrust cliches and concepts have no place in a farmer cooperative's monopoly market is aptly illustrated by the complaint in this case.

The Department of Justice charged, for example, that the Association "fixed and maintained arbitrary and non-competitive prices and terms for the sale of milk" and engaged in other pricing practices which resulted in "denying consumers the opportunity to buy fluid milk at prices resulting from free and open competition in the production and sale of milk." Yet free and open competition is precisely what Capper-

Volstead and other farm legislation are designed to discourage. And when a producer cooperative reaches monopoly size, any price that it charges is "fixed." *American Tobacco Co.* v. *United States*, 328 U.S. at 811. The complaint also charged that the cooperative had engaged in "predatory pricing." But in support of its use of this antitrust cliche, the government pointed to instances in which prices charged to dealers within the monopoly market were higher than those charged where competition existed. While such a contrast might support the condemnation of an industrial monopoly, in agriculture it is a sign that the producers in the monopoly market have achieved the congressional goal. In still another allegation, monopolization was said to have been effectuated by the Association's conduct in seeking and urging "action by governmental agencies for the purpose of excluding or eliminating competition." Such conduct by cooperatives has been squarely sustained by this Court's decision in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939).

The trial of the Association's acquisition of Embassy Dairy, alleged as a violation under all counts of the complaint, affords the most striking illustration of agricultural policy under antitrust attack. As authorized by Section 1 of the Capper-Volstead Act, the purchase of Embassy was consummated by a contract needed to carry out the purpose of collective processing and marketing. As authorized by Section 7 of the Agricultural Marketing Act, it was financed with a loan of federal funds from a regional bank for cooperatives upon findings that the acquisition would further the anticompetitive policies of the statute. The loan was approved only after an analysis by the Farmer

Cooperative Service of the Department of Agriculture had concluded that the acquisition would probably achieve the desirable goals of alleviating the market's surplus problem, eliminating price cutting and enhancing returns to producers. Following its consummation, the acquisition was reviewed by the Department of Agriculture, which advised the Attorney General that no violation of the Capper-Volstead Act had been found. And at trial the Director of the Marketing Division of the Farmer Cooperative Service testified that the acquisition was consistent with the studies and advice which that Service had been giving to cooperatives.

For the very same reasons that agricultural statutes authorized and agricultural agencies financed or approved the Association's acquisition of Embassy, the Department of Justice prosecuted it and the district court found it to have violated Section 7 of the Clayton Act and Section 3 of the Sherman Act. Only by interpreting the Capper-Volstead Act as we have urged, and as the 67th Congress intended, can conflict between the Department of Justice on the one hand and its coordinate agricultural agencies on the other be avoided, and can cooperative associations of farmers be removed from the threat of prosecution for carrying out federal policy in agriculture.

ARGUMENT

Introduction

The day when the law made farmers adhere to the rule of "free competition, free markets and free enterprise" is a memory of the distant past. Federal and state governments have long since recognized that the never ending struggle against surplus production and

low prices required a wholly new set of standards and controls to uplift and to stabilize, rather than expose to destructive competitive forces, the economy of agriculture. It is a lesson of history eloquently echoed in the decisions and opinions of this Court. "Since Connolly's case was decided," nearly 60 years ago,

> an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the antitrust laws; have relieved their organizations from taxation. *Tigner* v. *State of Texas,* 310 U.S. 141, 145-6 (1940).

In no area of agriculture have the need and methods for departing from competitive principles been explored by this Court so fully or so often as in the realm of farmer marketing of milk. E.g. *Nebbia* v. *New York,* 291 U.S. 502 (1934); *United States* v. *Rock Royal Co-op,* 307 U.S. 533 (1939); *Stark* v. *Wickard,* 321 U.S. 288 (1944); *Brannan* v. *Stark,* 342 U.S. 451 (1952). Cases such as these describe in detail the economic conditions which have led this Court and state courts to uphold statutes that sanctioned and spurred the development of anti-competitive agricultural cooperatives on the theory that "combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen." *Tigner* v. *State of Texas,* 310 U.S. at 145; see cases cited in *United States* v. *Rock Royal Co-op,* 307 U.S. at 563, n. 27.

But it is also in a milk case that this Court marked the boundary beyond which even special legislation governing farmers and their products did not go. In *United States* v. *Borden Co.*, 308 U.S. 188 (1939), a district court had dismissed an indictment under Section 1 of the Sherman Act charging conspiracy among a milk producers cooperative, major distributors and their allied groups, a labor union, municipal officials, and others, to restrain trade in the distribution of milk in the Chicago market. This Court reversed. It held that the Agricultural Marketing Agreement Act did not remove commerce in agricultural commodities from protection by the Sherman Act where restraints were imposed by "conspiring producers, distributors and their allies." 308 U.S. at 198, 202-3. *Borden* further held that the Clayton and Capper-Volstead Acts did not immunize agricultural cooperative organizations from the reach of the Sherman Act if they participated in "any combination or conspiracy with other persons in restraint of trade." 308 U.S. at 204.

The Issue in This Case

In the 20 years since *Borden* no decision of this Court has challenged the principle that a farmer cooperative may interfere with and restrain competition in the marketing of its products so long as it does not join in combination or conspiracy with an outsider,—a non-farmer or non-farmer group. On these appeals, the position taken by the Government expressly presents such a challenge. As conceded in its Jurisdictional Statement in No. 73 (p. 9), the Government does "not contend that the *Borden* decision is fully determinative of the issue presented here," i.e. in the appeal under Section 2 of the Sherman Act.

The Government states that the issue which reaches beyond *Borden* is "whether the Clayton Act and the Capper-Volstead Act confer upon an agricultural cooperative, not acting in combination or conspiracy with outsiders, absolute immunity to monopolize and to attempt to monopolize trade in an agricultural product." The words "absolute immunity" are, of course, an overstatement because the Capper-Volstead Act itself provides in great detail for proceedings against monopolizing cooperatives under specified circumstances. But insofar as "absolute immunity" means exemption from original proceedings under the Sherman and Clayton Acts, we agree that the issue here is stated correctly by the Government.

We believe, moreover, that the issue thus stated is central not only to the Government's Section 2 appeal but to the Association's appeals under Section 3 of the Sherman Act and Section 7 of the Clayton Act as well. The development of the case as it progressed through the district court demonstrates that this is so. When first filed, the complaint consisted of charges under Sections 1, 2 and 3 of the Sherman Act and Section 7 of the Clayton Act, all of which were devoid of any reference to participation by the Association in any combination or conspiracy (R. 1-12). Two and a half months later an amended complaint was filed for the unmistakable purpose of bringing the Section 1 and 3 allegations within the *Borden* rule (R. 12). The simple charge that the Association had "made and executed a contract" to purchase the assets of Embassy Dairy, Inc., for purposes in unreasonable restraint of trade (Complaint ¶ 24, R. 7-8) was transformed into more prolix allegations that the signatories to the Embassy contract had "been engaged in an un-

lawful combination and conspiracy" for precisely the same purposes (Amended Complaint ¶¶ 24-28, R. 18-21). Were it not for this Court's decision in *Borden*, no such change would have been required since charges of "contract" and of "combination and conspiracy" ordinarily carry equal weight under Sections 1 and 3 of the Sherman Act. 15 U.S.C. §§ 1, 3.

The "conspiracy" amendment, however effective it may have been to enable the Government to state a legally sufficient charge against a farmer cooperative (R. 132), was in effect abandoned at trial. No evidence apart from the contract (R. 586), its ancillary covenants (R. 597) and their execution was offered in support at the Section 7 trial. And when separate trial was held on the charges under Sections 1 and 3, both sides rested on the prior record without offering additional evidence (R. 504). In ruling that Section 3 of the Sherman Act was violated, the district court made no finding, no conclusion, no mention of combination or conspiracy (R. 504-6).

What the district court did find in this respect is of especial significance. In its first opinion on October 16, 1958, the court had squarely followed *Borden* by ruling that the exemption of cooperatives from anti-trust prosecution was lost "when they step outside of their field and conspire with persons who are not producers of agricultural products" (R. 130). It was expressly on this ground that the court upheld the cause of action under Sections 1 and 3 of the Sherman Act as "clearly within the exception of the Borden Case" (R. 132). But when the ensuing trial ended, the decision holding Section 3 to have been violated was based solely on findings and conclusions, repeated nine

times, which referred to the Embassy acquisition simply as a "transaction" (R. 504-6).

As the case arrives in this Court, the acquisition of the assets of Embassy Dairy, Inc. is relevant to all three charges: as a means of monopolization in the Section 2 case (R. 18, ¶ 22d; R. 40), as a contract or "transaction" in the Section 3 case (R. 504-6) and as an "acquisition" in the Section 7 case (R. 480-95). All notions of combination or conspiracy with outsiders are gone (R. 49). The concession by the United States to the effect that liability in the Section 2 case is not determined by *Borden* governs the entire appeal. On this basis, the issue which pervades the case is clear: Does the *Borden* rule draw the line on the applicability of the antitrust laws to farmer cooperatives, or is there an as yet unarticulated test, short of conspiracy with others, that can distinguish the lawful from the unlawful anticompetitive acts of an association of farmers authorized to market their product together?

We believe that the freedom of farmer cooperatives to act without fear of direct Sherman Act prosecution is limited only by the *Borden* test. The provisions of the Capper-Volstead Act, as illuminated by a compelling and heretofore unexamined legislative history, were clearly designed to provide the exclusive standard and procedure for controlling monopolistic conduct by farmer cooperatives acting alone. This conclusion is reinforced by extensive federal legislative and administrative action which, in seeking to reduce the destructive role of competition in the marketing of farm products, has specifically promoted activities that violate conventional antitrust standards.

I. THE CAPPER-VOLSTEAD ACT PROVIDES THE EXCLUSIVE PROCEDURE FOR CONTROLLING MONOPOLISTIC CONDUCT BY FARMER COOPERATIVES ACTING ALONE

The Capper-Volstead Act was enacted in 1922 for the purpose of clarifying the relationship between farmer cooperatives and the antitrust laws. In Section 1 it describes a wide range of market activities in which competing farmers may engage collectively. On its face that Section grants broad authority to cooperatives to achieve marketwide domination and power. In Section 2, the Capper-Volstead Act sets forth standards to limit the authorized anticompetitive conduct of farmer cooperatives and establishes a comprehensive remedial procedure. In contrast to Capper-Volstead, the Sherman and Clayton Acts prohibit combinations of competitors and circumscribe the acquisition of dominance and power. The philosophies underlying these statutes, agricultural and antitrust, thus conflict in their basic premises. Are the remedial procedures established by these divergent laws nevertheless intended to apply concurrently? Or is the Capper-Volstead Act designed to supplant conventional antitrust standards and remedies in the regulation of farmer cooperatives—absent a *Borden* situation?

A. The Statutory Background of Capper-Volstead

1. The Sherman Act

The first mention of agricultural antitrust exemption dates back to the Sherman Act itself. On March 25, 1890, Senator Sherman offered a proviso to be added at the end of Section 1 as follows (21 Cong. Rec. 2726):

> Provided, that this Act shall not be construed to apply . . . to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with a

view of enhancing the price of their own agricultural or horticultural products.

The Senate, while sitting as a Committee of the Whole, agreed to the proviso (21 Cong. Rec. 2726), but it was later dropped by the Senate Judiciary Committee without comment. Whether the proviso was deleted as undesirable or merely as unnecessary is not clear (51 Cong. Rec. 13663, 14016), but whatever the reason, the legal effect of congressional failure to adopt it in 1890 was settled by this Court in 1908 in *Loewe* v. *Lawlor,* 208 U.S. 274, 301, where Chief Justice Fuller stated:

> The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the Act, and that all these efforts failed, so that the Act remained as we have it before us.

2. The Clayton Act

Following *Loewe* v. *Lawlor,* there was a widespread demand for an end to the threat of prosecution as unlawful combinations in restraint of trade that hung over labor and farm organizations. Section 6 of the Clayton Act was the result. It provided:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof be held or construed to be illegal

> combinations or conspiracies in restraint of trade under the antitrust laws.

On its face, the scope of Section 6 was unclear. Competing farmers were unmistakably authorized to combine in organizations which, of themselves, were not to be held in violation of the antitrust laws. Ambiguity arose when the statute authorized exemption for both "existence and operation" of farm organizations, but limited that exemption to "lawfully carrying out" their "legitimate objects." The legislative history of Section 6 demonstrates that this ambiguity was the fruit of compromise between those who opposed any exemption and advocates of complete immunity. As we shall later show, this history is in marked contrast to that of Capper-Volstead.

The Clayton Act was introduced on April 14, 1914 as H.R. 15657 of the 63rd Congress, Second Session. House Report 627 stated that the provision which ultimately emerged as Section 6 was designed to remove all doubt as to the legality of farm and labor organizations and that (p. 16)

> the law should not be construed in such a way as to authorize their dissolution by the courts under the antitrust laws.

Minority reports were filed by Congressmen Volstead, Nelson and Morgan, complaining that the bill did not sufficiently aid farmers. One view was that

> the only sort of farmer organization which this section sanctions is one which does nothing more than to discuss better agricultural methods. As soon as farmers combine to get better prices for their products, or to sell directly to consumers, this paragraph affords them no relief from the antitrust laws. H. Rep. 627, Part 3, p. 10.

When the bill reached the floor of the House, Representative Webb of North Carolina, Chairman of the Judiciary Committee, offered as the Committee's amendment language which ultimately became the last part of Section 6 (51 Cong. Rec. 9538):

> nor shall such organizations, orders, or associations, or members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

The Committee member who had drafted this language, Representative Henry of Texas, stated (51 Cong. Rec. 9540):

> We called into the conference with us the heads of the American Federation of Labor, and submitted this amendment to them, and said to them that we believed its adoption as an addition to section [6] would clearly exempt labor organizations and farmers' organizations from the provisions of the antitrust laws.
>
> They agreed with us; they called their counsel into conference with them and with us, and we all concurred that this amendment added to the paragraph of section [6] would give these organizations what they have desired so long, and all they have been struggling for since the original enactment of the Sherman antitrust law.
>
> In my judgment, when Congress was dealing with "combinations in restraint of trade" it never intended that the law should apply to labor organizations or farmers' organizations without capital and not for profit. The courts took a different view of it and construed the act as it was never intended that it should be interpreted. The time has come when we can correct that error and write the language in the law as those gentlemen insist that it should be and should have been.

Representative Barkley of Kentucky also took the view that the Webb amendment exempted labor organizations and farmer cooperatives from the antitrust laws (51 Cong. Rec. 9554). But numerous congressmen took an opposite view. Representative Volstead urged that the amendment be clarified "so that it will not be open to dispute as to its meaning" (51 Cong. Rec. 9564). He stated:

> It is very unfortunate that an amendment should be proposed to this bill which must of necessity go into the courts after it becomes a law before anybody will know definitely just what it means. It looks as though it has been drawn to deceive somebody.

His plea was echoed by others but the Webb amendment was adopted without change by a vote of 207 to 0 (51 Cong. Rec. 9566).

During the debate, Chairman Webb was evasive as to his views on the full meaning of the amendment. While appearing to favor a narrow interpretation (e.g. 51 Cong. Rec. 9567), he later took a broader view in response to a specific question (51 Cong. Rec. 9578):

> Mr. MANN. So that if a million farmers, if they could get them to agree, could agree not to sell cotton below a fixed price or corn or wheat or any other product below a fixed price, and that agreement would be lawful?
>
> Mr. WEBB. So long as the farm products are in the hands of those who produce them.

Dissatisfaction with the Webb amendment prompted Representative Thomas of Kentucky to offer a substitute (51 Cong. Rec. 9538):

> the provisions of the antitrust laws shall not apply to agricultural, labor, consumers, fraternal, or horticultural organizations, orders or associations.

This amendment was rejected by a vote of 105 to 69 (51 Cong. Rec. 9569), and without further change the bill passed the House (51 Cong. Rec. 9911).

When the bill reached the Senate, the report of the Judiciary Committee stated (Senate Report 698, 63rd Cong., 2d Sess., p. 2):

> The other important and general purposes of the bill are to exempt labor, agricultural, horticultural, and other organizations from the operations of the antitrust acts.

Senator Culberson, Chairman of the Committee, declared on the floor (51 Cong. Rec. 13848):

> Following the original purpose of the framers of the Sherman antitrust law, the bill proposes expressly to exempt labor, agricultural, horticultural, and other organizations from the operation of the antitrust laws.

Senators who took a narrower view thought the bill merely protected organizations from being prosecuted "for performing lawful acts." Within such category they gave the examples of "withholding crops for higher prices, refusing to work for certain wages and acts of that character" (51 Cong. Rec. 13848). Senator Pomerene, on the other hand, believed that Section 6 was drafted too broadly because it would permit organizations to engage in unlawful activities (51 Cong. Rec. 13911). Others, who favored the bill because it placed agricultural organizations outside the Sherman Act, suggested that the permission given by the bill

for "lawfully carrying out the legitimate objects thereof" meant that (51 Cong. Rec. 13967):

> An act will be lawful in this connection unless it is prohibited by some special statute or by common law.

As in the House, there were fervent pleas to clarify the scope of the section since it was being supported by so many who held conflicting views as to its meaning (51 Cong. Rec. 14011).

Near the end of the debate, Senator Cummins offered an amendment to delete the words "agricultural and horticultural" because they would repeal the antitrust laws in important respects (51 Cong. Rec. 14586). He did not want to permit such organizations to "forestall the market" or "to come together for the purpose of increasing the price or affecting the trade in the things in which the members of the association deal." The Cummins amendment was opposed by many, such as Senator Pittman of Nevada, who believed it to be highly desirable that (51 Cong. Rec. 14587-8)

> if they can not be held or construed to be illegal combinations or conspiracies, then they are not subject to prosecution under this act, or not subject to the jurisdiction of the court under this act.

The Cummins amendment was rejected by a vote of 39 to 20 (51 Cong. Rec. 14590) and shortly afterwards the bill was passed in the form in which it became law (51 Cong. Rec. 14610, 14737, 16170, 16344).

3. The Consequences of Ambiguity

The legislative history of Section 6 of the Clayton Act shows that different members of Congress supported its language for opposite reasons. Amendments were adopted by men who disagreed as to their meaning or acknowledged that the meaning was unclear. And the Reports themselves drew different conclusions from identical language, the Senate Report declaring that its purpose was to "exempt" farm and labor organizations while the House Report merely indicated that the application of those laws to agriculture and labor was being limited.

One effect of the Act is clear. Since the last clause of Section 6 expressly provided that agricultural organizations shall not be held "to be illegal combinations or conspiracies in restraint of trade," and both Houses agreed that courts would be precluded from ordering dissolution, and no limit was placed on the size of any such organization, there is no doubt that a cooperative was fully authorized to enlist 100% of the farmers in any market without fear of being held an unlawful monopoly. But with respect to the authorized scope of activities, the language was subject to conflicting interpretations.

The failure of Section 6 to protect cooperatives against antitrust prosecution soon became apparent. In *United States* v. *King*, 229 Fed. 275 (D. Mass. 1915), an indictment under Section 1 of the Sherman Act against members of the Aroostook Potato Shippers' Association for conspiracy in restraint of trade was upheld. The court stated that

> when an association controlling 75 per cent of a certain commodity refuses to do business with any

> given dealer in it its action so clearly and naturally restrains his trade that his intent to do so must, I think, be presumed from the action itself.

Such an association, the court ruled,

> had no right to endeavor to enforce its judgments by insisting that outsiders also obey them or else be blacklisted. 229 Fed. at 279, 280.

The following year, the Association came before the same court under a new indictment. *United States* v. *King*, 250 Fed. 908 (1916). This time the defendants contended that they were (p. 909)

> an agricultural organization within the Clayton Act, and that they are not therefore subject to prosecution, even assuming that otherwise they would be.

The district court did not agree. First, it held that the character of the Association as set forth in the indictment did not meet the requirements of Section 6 of the Clayton Act. Second, in dicta, the court stated that

> even if it were so, I do not think that the coercion of outsiders by a secondary boycott, which was discussed in my opinion on the former indictment, can be held to be a lawful carrying out of the legitimate objects of such an association. That act means, as I understand it, that organizations such as it describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations. 250 Fed. at 910.

Criminal prosecutions such as *King* were oppressive to farmer organizations, even when unsuccessful. The fact that Section 6 did not remove the threat of indictment led to pleas that Congress act again. What the farmers sought was not unqualified freedom to monopolize, but a system that would place them under supervision other than that of the Department of Justice and its district attorneys.[3] Congress provided this in the Capper-Volstead Act.

B. The Design of Capper-Volstead

Although the Capper-Volstead Act (App. 5a) does not in terms confer exemption from the antitrust laws, it has long been understood to be an exemption statute. Only eight years after its enactment, Attorney General Mitchell advised the President that the object of the Capper-Volstead Act "was primarily to insure cooperative associations that qualified thereunder immunity from prosecution under the Federal antitrust laws." 36 Op. Atty. Gen. 326, 333 (1930). And this Court itself has only recently referred to the Capper-Volstead Act as "one of the specific exemptions from the operation of the antitrust laws," one of the exceptions made by Congress "to the generality of monopoly prohibitions:" *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 388 (1956). The issue in this Court is not whether the Capper-Volstead Act is an exemption statute but how far the exemption extends.

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[3] See Hearings Before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 66th Cong., 2d Sess., on S. 4344, A Bill to Authorize Association of Producers of Agricultural Products, at 5-6, 9, 10, 27-28; and hearings before the same committee in the 67th Congress, 1st Session, on H.R. 2373 and H.R. 13931, at 84.

1. The Statute On Its Face

Because the language of Capper-Volstead, like Section 6 of the Clayton Act, undertook to authorize the creation of agricultural cooperatives, no evaluation of that language can ignore the comparison with the wording of Clayton. At the outset it is clear that Capper-Volstead liberalized the eligibility requirements for cooperatives. Whereas the Clayton Act refers only to agricultural organizations "not having capital stock," Section 1 of Capper-Volstead more comprehensively covers all "associations, corporate or otherwise, with or without capital stock," and carefully prescribes how such associations may qualify for its benefits. Had the purpose of Congress merely been to broaden the Section 6 exemption to include stock as well as non-stock organizations, an amendment adding or deleting a few words in the Clayton Act would have sufficed.[4] But Capper-Volstead went further. Whereas the language of Clayton is exclusively negative, stating simply that the antitrust laws shall not apply to the lawful conduct of cooperatives, Section 1 of Capper-Volstead makes an affirmative grant of authority. It says that farmers may act together for the purpose of collectively performing each of the vertically integrated functions of processing, preparing for market, handling and marketing. These functions form, of course, the entire path which a commodity travels from the farm to the consumer. The farmers and their associations may have marketing agencies in common and may make all contracts necessary to carrying out these purposes. There are no words of limitation whatever.

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[4] This was exactly the point of Congressman Igoe, floor leader of the opposition to Capper-Volstead in the House (App. 14a).

But the single most revealing aspect of Capper-Volstead is found not in Section 1 but in Section 2. Whereas Section 6 of the Clayton Act offers no alternative procedure to regulate the organizational activities it exempts, Section 2 of Capper-Volstead prescribes an elaborate regulatory scheme replete with overtones of substantive and procedural antitrust law. If no exemption from ordinary antitrust enforcement was intended, why did Congress establish the carefully drawn and comprehensive procedure provided for in Section 2 of the Capper-Volstead Act? The position that Section 2 was meant merely to give the Government an additional weapon against cooperatives turns out upon study of that Section to be untenable.

Section 2 requires the Secretary of Agriculture to proceed against a cooperative if he believes that it monopolizes or restrains trade "to such an extent that the price of any agricultural product is unduly enhanced by reason thereof." 7 U.S.C. § 292. The initial determination is to be made after administrative hearings. If the charge is established, the Secretary of Agriculture must issue an order against monopolization or restraint of trade. In the absence of voluntary compliance, the Department of Justice must proceed to enforce the order in a district court. There the cooperative may secure a new hearing with prima facie effect being accorded to the Secretary's findings. Full antitrust equitable relief may be ordered by the district court.

Plainly, resort to this complex administrative-judicial scheme would be an act of folly if the ordinary antitrust prohibitions against monopolization and restraint remain fully applicable to cooperatives. For

under the antitrust laws alone, the Department of Justice can achieve precisely the same equitable relief without a prior proceeding in the Department of Agriculture and without the necessity of proving in district court not only that the cooperative monopolized or restrained trade but also that it enhanced prices unduly.

Interpreting Capper-Volstead as a mere alternative to direct antitrust prosecution would render superfluous its Department of Agriculture proceeding and its requirement to prove undue enhancement. Such an intention cannot be ascribed to Congress lightly or without assurance that no more reasonable result was intended. This is not to say that the Capper-Volstead procedure was meant to be exclusive when an agricultural cooperative combined or conspired with outsiders. And in *United States* v. *Borden Co.*, 308 U.S. 188, 206 (1939), this Court expressly held that in such circumstances "the procedure under Section two of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by Section one." The Court's opinion in *Borden* clearly did not go beyond construing Capper-Volstead as occupying an auxiliary role in conspiracy situations.[5] It stated:

> But as Section one cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment,

[5] The conspiracy basis of the *Borden* ruling was reemphasized in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 808 (1945), where, in relying upon *Borden*, this Court itself underscored the language of Chief Justice Hughes that the right of agricultural producers to combine could not be "deemed to authorize any combination or conspiracy *with other persons.*"

> the qualifying procedure for which Section two provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under Section one of the Sherman Act for the purpose of punishing such conspiracies. 308 U.S. at 206.

No resort whatsoever to the legislative history was made or needed in *Borden* to find that Capper-Volstead's procedure was not intended to prevent the antitrust laws from being applied to a market conspiracy between a cooperative and outsiders.

It is against this backdrop that we turn to an analysis of the legislative history. This history shows conclusively that Section 2 was not designed to be an additional weapon in the arsenal of antitrust remedies against cooperatives acting alone, but was intended by Congress to be a substitute for them.

2. The Legislative Development

The Capper-Volstead Act of 1922 (7 U.S.C. §§ 291, 292) substantially follows the provisions of two bills—H.R. 13931 and H.R. 2373—introduced in the 66th and 67th Congress, respectively. The legislative history of these bills is extensive and illuminating beyond measure on the critical issue which confronts this Court. It is true, as always, that different Congressmen and Senators expressed varying points of view. But in sharp contrast to Clayton Act discussions, the debates here were sharply focussed on clear issues, and the actions in each house—unlike many congressional debates—clearly resolved the points at issue. A study of the legislative history in its entirety impels the conclusion that the remedy provided by Section 2 of Capper-Volstead was intended to be exclusive in

all cases involving monopolization or restraints, otherwise cognizable under the Sherman and Clayton Acts, when charged against a cooperative acting apart from combination or conspiracy with outsiders. This intent appears with remarkable consistency, as we shall show below, in the design of the draftsmen, the purpose of the sponsors and the understanding of both advocates and opponents of Capper-Volstead.[6] And, as we shall show in part II of this brief, this interpretation of the Capper-Volstead Act is necessitated by the practical realities of farmer cooperative activity.

In view of the importance which we attach to the legislative history of Capper-Volstead, we have set forth in the Appendix a running summary which accurately conveys the essence of the debates and reports, the issues and their resolution. We will refer to representative portions of that Appendix as, e.g., (App. 7a).

a. *Outline of Congressional Action*

In broad outline, Capper-Volstead was the product of sharp legislative conflict in two consecutive Congresses over the perplexing problem of how to resolve farmer cooperation with competition. It was intro-

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[6] "The unanimity with which foes and supporters of the bill spoke of its aims * * * permit use of the debates in interpreting the purpose of the act." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493, n. 15 (1940). The "exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation" often is a reliable guide to legislative meaning. *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 463, n. 8 (1937). The "fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied." *Federal Trade Commission* v. *Raladam*, 283 U.S. 643, 650 (1931).

duced as H.R. 13931 by Congressman Volstead and as S. 4344 by Senator Capper in the 66th Congress in a form similar to the final version (App. 7a). The House passed it with minor amendments but the Senate substituted the Federal Trade Commission for the Secretary of Agriculture in Section 2, and added a provision prohibiting monopoly (App. 19a). A conference committee was unable to resolve House-Senate differences before Congress adjourned (App. 7a, 20a, 21a, 32a, 47a-48a). The bill was reintroduced in the 67th Congress as H.R. 2373 and S. 983 in substantially the form in which it became law. After passage by the House the Senate Judiciary Committee proposed an amendment to eliminate Section 2 in its entirety and substitute a prohibition against monopoly (App. 26a). The bill was passed only after extensive debate in the Senate had culminated in overwhelming rejection of the antimonopoly amendment (App. 47a) as well as the amendment to replace the Secretary of Agriculture by the Federal Trade Commission (App. 46a).

Capper-Volstead, like Clayton, arose out of concern for the perennial problem of low prices for farm products. The individual farmer was recognized to have little bargaining power when, in the language of the House Reports (App. 9a, 20a),

> he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price.

The economic power which the bill intended to confer on farmers could come about only if the cooperative

could, in the words of Senator Capper, "control and handle a substantial part of a given commodity in the locality where it operates" (App. 31a). In this way, Representative Volstead observed, cooperatives enable farmers to maintain "a much higher average of prices" (App. 47a-48a). Section 6 of the Clayton Act had proven to be too indefinite and ambiguous an exemption to afford adequate assurance to farmers that their cooperatives would not be harassed by antitrust attacks (App. 8a-9a, 18a-19a). The threat of criminal prosecution in particular, which had long beset farm organizations and deterred farmers from joining them, had to be dispelled (App. 23a-25a, 29a-30a). Some sort of regulation to prevent both persecution of cooperatives and abuse by them had to be devised. The answer is found in Section 2 of the Capper-Volstead Act.

b. *The Drafting of Section 2*

The origin of Section 2 of the Capper-Volstead Act reveals much about the intent of its sponsors and supporters. As explained by House Report 939 of the 66th Congress (App. 8a) and House Report 24 of the 67th Congress (App. 20a), "Section 2 makes applicable to these associations in a modified form the provisions of the Clayton Act." Congressman Volstead told the House that because (App. 12a)

> we are granting these associations much larger powers than they had under the Clayton Antitrust Act, it was thought that they ought to be put under some supervision, because there has been complaint against some of these associations, and it was for that reason section 2 was drawn. That section is modeled largely upon some of the provisions of the Clayton Antitrust Act.

And Senator Capper stated that the "complete and adequate remedy" provided in Section 2 was (App. 31a)

> taken from the Federal Trade Commission Act, and the Secretary of Agriculture can, as the Federal Trade Commission has repeatedly done, issue orders to cease and desist from specific acts.

In order to appreciate these remarks of the draftsmen, reference must be made to the original Clayton Act, 38 Stat. 730, and Federal Trade Commission Act, 38 Stat. 719, as they existed at the time of Capper-Volstead. Such a study discloses that the procedure delineated in Section 2 of the Capper-Volstead Act was a composite patterned on the provisions of (1) Section 11 of the Clayton Act (15 U.S.C. § 21) and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), which in their pertinent procedural provisions are substantially identical, and (2) Section 15 of the Clayton Act (15 U.S.C. § 25), which is virtually identical to the procedure of Section 4 of the Sherman Act (15 U.S.C. § 4). Because the importance of this derivation goes to the heart of the issue presented to this Court, we set forth in the attached table a representative comparison of these statutes.

This comparison illustrates several revealing points:

(1) Section 2 of Capper-Volstead gave the Secretary of Agriculture jurisdiction over farmer cooperatives in much the same manner as Section 11 of the Clayton Act had allocated jurisdiction to the Interstate Commerce Commission for common carriers, the Federal Reserve Board for banks, and the Federal Trade Commission for "all other character of commerce." 15

COMPARISON OF SECTION 2 OF THE CAPPER-VOLSTEAD ACT WITH SECTIONS 11 AND 15 OF THE CLAYTON ACT

Capper-Volstead Act, Section 2	*Clayton Act, Section 11 plus Section 15*
(1) If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof.	(1) *Section 11.* That authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows: Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven, and eight of this Act.
(2) He shall serve upon such association a complaint stating his charge in that respect.	(2) § *11.* It shall issue and serve upon such person a complaint stating its charges in that respect.
(3) If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the rice of any agricultural product is unduly enanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade.	(3) § *11.* If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations.
(4) On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing.	(4) § *11.* If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. • • • Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review on such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside.

(5) Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable and may make rules as to pleadings and proceedings to be had in considering such order.

(6) The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts but either party may adduce additional evidence.

(7) The Department of Justice shall have charge of the enforcement of such order.

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Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable . . .

(8) After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy.

of the commission or board be set aside.

(5) § *11.* Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board.

(6) § *11.* The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearings in such manner and upon such terms and conditions as to the court may seem proper.

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(7) *Section 15.* That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.

(8) § *15.* When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make temporary restraining order or prohibition as shall be deemed just in the premises.

U.S.C. § 18. The Secretary's authority, however, was broader, more-inclusive. Instead of being limited to enforcing Clayton Sections 2, 3, 7 and 8, the mention in Section 2 of Capper-Volstead of "monopolization or restraint of trade" clearly referred to all provisions of the Sherman and Clayton Acts,[7] as modified by the "undue enhancement" clause.

That Congress intended to displace FTC jurisdiction over cooperatives and substitute the Secretary of Agriculture cannot be disputed. In the 66th Congress the Senate amendment to remove the Secretary from Section 2 and retain Federal Trade Commission authority instead (App. 20a) was one of the two points on which House-Senate conferees were unable to agree prior to adjournment (App. 21a, 48a). In the succeeding Congress, the Senate again debated the choice between these two agencies and voted to reject the FTC (App. 46a).

(2) Section 11 of the Clayton Act (as well as Section 5 of the Federal Trade Commission Act) provides for the issuance of a cease and desist order by the agency against the violation complained of. In similar language, Section 2 of Capper-Volstead gives the Secretary of Agriculture authority to order cooperatives to cease and desist. The Secretary's authority, however, is more sweeping than that of the FTC. Upon finding that monopolization or restraint of trade has unduly enhanced prices, the Secretary must issue an order not to lower high prices but to "cease and desist

[7] The Sherman Act by its title and provisions was the "Act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209. The Clayton Act by its title and provisions was to "supplement existing laws against unlawful restraints and monopolies and for other purposes." 38 Stat. 730.

from monopolization or restraint of trade." 7 U.S.C. § 292. That very language of Section 2 was adopted as an amendment by the Senate expressly to deal with the problem of monopolization and restraint by cooperatives (App. 43a-44a).

(3) Court enforcement of orders issued under Section 11 is secured by application to the court of appeals, whose authority is limited to affirming, modifying or setting aside the FTC, ICC or FRB order on the basis of the agency record. It is here that Capper-Volstead's resemblance to Section 11 (and Section 5 of the Federal Trade Commission Act) ceases and the similarity to Section 15 begins. For court enforcement of Capper-Volstead orders must be sought in the district court. There, as in Section 15 of the Clayton Act, the proceedings are much more akin to a trial de novo than to appellate court review. Unlike Section 11 cases, where no provisional relief may be sought, Section 2 of Capper-Volstead authorizes the district court to grant temporary injunctions just as in Clayton Section 15. Instead of the agency findings being "conclusive" as in Section 11 (and Section 5), the findings of the Secretary of Agriculture are only "prima facie evidence" and both the Justice Department and the cooperative "may adduce additional evidence." 7 U.S.C. § 292. After the trial, the district court is not limited to "affirming, modifying or setting aside" the order of the Secretary, but may in a manner similar to Section 15 enter "such other decree as the court may deem equitable." 7 U.S.C. § 292.

The significance of this language is far-reaching. It gives to the Department of Justice the right to invoke the full arsenal of antitrust remedies against

monopoly. This is exactly why Senator Capper offered an amendment to add the language

> or enter such other decree as the court may deem equitable.

As explained by Senator Kellogg in support of the amendment (App. 40a)

> I said that if the Secretary of Agriculture found that the restraint of trade and the monopoly had gone to such an extent that the price of agricultural products was unduly enhanced, he could make an order against the restraint of trade and the monopoly, and if he brought a suit to enforce that, the court could apply any remedy against that particular monopoly and restraint of trade that it could now apply under the Sherman Act—that is, in the same form.

The amendment was adopted (App. 40a).

The cumulative effect of the foregoing comparison can now be appraised. In 1914, the Clayton Act, in Sections 11 and 15, had established a "dual system of enforcement." Under Section 11, the Federal Trade Commission or other specialized agency could conduct proceedings directed at a cease and desist order against violation of substantive sections of the Clayton Act. Agency findings, if supportable, were to be conclusive on court of appeals review. In Section 15, an alternative remedy for Clayton Act violations was provided. The Department of Justice, by an original action in district court, could seek a wide range of equitable antitrust relief. In 1922, the Capper-Volstead Act combined these alternatives for agriculture. In Section 2, Congress amalgamated the dual remedies of Section 11 and Section 15 into a single cohesive and

consecutive procedure to rule all cases involving monopolization or restraint of trade by cooperatives acting alone. Why Congress adopted this special procedure for cooperatives is made clear by the legislative reports and debates.

In studying these debates, it is important to bear in mind the alternative to the interpretation which we believe history urges. If Capper-Volstead is not construed as the exclusive vehicle by which antitrust standards are to be imposed on cooperatives acting alone, the alternative is that it is only a supplementary remedy. Such an alternative has peculiar consequences. If a cooperative, without outsiders, monopolizes or restrains trade, it becomes liable to a triple enforcement scheme: the Department of Justice by criminal or equity action in district court, the Federal Trade Commission by agency proceedings subject to court of appeals review, and the Secretary of Agriculture by agency proceedings followed by Justice Department equity enforcement in district court. Under this system Capper-Volstead, born of a desire to aid farmers by bolstering Section 6 of the Clayton Act, would actually mark a retreat from Clayton by adding another method of proceeding against cooperatives. No other segment of our economy is subject to antitrust attack from so many sides. No one familiar with the Act's history can contend that this triple-enforcement scheme resembles even remotely the purpose of the 67th Congress.

c. The Intent of Congress

(1) Regulated Monopoly vs. Antimonopoly

Hardly anyone in the 66th or 67th Congress argued against cooperatives or the need for joint action by farmers. The pivotal issue, instead, was monopoly. Was the economic power of combining farmers to be stopped short of monopoly? Or was monopoly a desirable goal so long as regulation was available to prevent its abuse? It was this very conflict which the Senate and House conferees had been unable to resolve in the 66th Congress. Senator Walsh, Chairman of the Senate Judiciary Committee, later told his colleagues that "the Senate conferees insist[ed] upon that amendment proposed by them, to the effect that nothing in the act was to be deemed to authorize the creation of or the attempt to create a monopoly" (App. 32a). Representative Volstead, Chairman of the House Judiciary Committee, told the same story. He stated to the House that its bill in the 66th Congress "was so amended in the Senate that in my view it would defeat its purpose, and it consequently failed of passage at that time" (App. 48a).

The monopoly issue recurred in the 67th Congress when the Senate Judiciary Committee recommended that the House bill be amended to delete Section 2 and add to Section 1 the following amendment (App. 26a):

> Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, on account of unfair methods of competition in commerce.

Chairman Walsh stated that "the sole matter of difference . . . the sole question for determination" was "whether we shall authorize the setting up of monopolies under the protection of this bill" (App. 32a). The choice was that "under the House bill . . . there may be a monopoly, but subject to regulation," whereas "the Senate bill forbids monopoly utterly" (App. 32a). When asked what rights the Senate Committee bill would give to cooperatives "that they do not now have under existing law," Chairman Walsh explained the difference between Sections 1 and 2 of the Sherman Act and concluded (App. 33a):

> it is our purpose to relieve these associations from all possible risk of being prosecuted under section 1 of the act, but not under section 2.

But supporters of the House bill pointed up the inadequacy of any statute that would legalize a combination under Section 1 of the Sherman Act but not under Section 2. Senator Sterling, a member of the Judiciary Committee, astutely observed (App. 42a)

> that the same evidence to be adduced in a charge that there has been a combination or contract or conspiracy in restraint of trade may be adduced in support of a charge that there is a monopoly or that there has been an attempt to monopolize.

As a result, he concluded (App. 42a):

> A man who desires to prosecute a combination or association of farmers has only to say, "There is here an attempt to create a monopoly" and he produces the evidence; and he would have produced the same kind and class of evidence had the charge been that there had been an agreement in restraint of trade and commerce.

There was no illusion in either House as to the practices which would inevitably flow from authorizing cooperatives to monopolize. It was recognized and not disputed that cooperatives could not combine with outsiders. As stated by Representative Volstead (App. 22a):

> If these organizations should combine with corporations not organized as provided in this bill to thus monopolize or restrain trade, they will become subject to the Sherman Antitrust Act just the same as any other combination or corporation.

But exclusive dealing arrangements with middlemen (App. 15a, 16a-17a), storing products to force higher prices (App. 18a), agreement among cooperatives not to sell to merchants who resell at unduly low prices (App. 22a) and exclusion or coercion of independent producers (App. 16a-17a, 42a-43a) were recognized by both supporters and opponents of the legislation as conduct which could be attacked under the House bill only if it resulted in unduly enhanced prices. In fact it was directly to prevent monopolistic cooperatives from excluding independent producers from business that Senator Walsh offered an amendent to require a cooperative to admit to membership any qualified person (App. 42a). The Senate rejected that proposal (App. 43a).

The fear of monopoly voiced by opponents of Capper-Volstead was almost always illustrated in terms of milk. It was pointed to by the Senate Report as the prime example of the need for an antimonopoly provision (App. 27a). A prohibition against monopoly, explained Chairman Walsh, would be "a feature that is of no consequence whatever to the producer of the

ordinary line of farm products" such as grain, cotton and potatoes (App. 33a). It would affect only those articles produced within limited areas, such as raisins, or "that must be produced within a limited distance from those centers in which they are consumed," like milk. In such cases, "the prohibition of monopoly is a matter of very great consequence" (App. 33a). The example of a "hypothetical" monopolistic association composed of milk producers in "the country tributary to the city of Washington" (App. 34a-35a), or formed by the merger of a Maryland association and a Virginia association (App. 35a-36a) was frequently discussed (App. 14a-15a, 37a-38a, 39a, 47a). Chairman Walsh alluded to the high price of milk then prevailing in Washington (App. 36a-37a)

> for the purpose of showing that outrageous exactions might be made through the organization of such an association as the Senate substitute seeks to prevent, and the advocates of the bill as it passed the House insist should be permitted to operate.

But the possibility of a monopoly in milk was considered by supporters of the House bill to be an insufficient reason for continuing to subject farmer organizations to antitrust prosecution. Thus Senator Kellogg, floor leader for proponents of the House bill (App. 28a), opposed the Committee's antimonopoly amendment because it would (App. 30a)

> hold the sword and the threat of the Sherman Act over all the farming activities of the country, and subject them to unreasonable prosecution and harassments in order to protect the public in a few articles. This bill furnishes ample protection against undue exactions in those articles which it is claimed may be monopolized.

The trouble with the amendment, Senator Kellogg indicated, was that it would subject a cooperative to prosecution for being a "technical monopoly" without regard to "whether it has been of benefit to the public or not" (App. 30a).

It was on the basis of this sharply defined debate on monopoly that the Senate in the 67th Congress reversed its stand of the 66th and by a vote of 56 to 5 rejected its own Judiciary Committee's amendment which, if adopted, would have authorized prosecutions such as the one now confronting this Court (App. 47a). Upon the defeat of that amendment, the bill was returned to the House where Representative Volstead recommended concurrence in the Senate's minor amendments (App. 47a-48a).

(2) The Meaning of Exemption

The decision of the 67th Congress to permit monopoly by agricultural cooperatives did not signify liberation from antimonopoly control. No one advocated that cooperatives be removed from the Sherman and Clayton Acts and left alone. "The farmers themselves" were said to recognize that "there must be some sort of public control" (App. 23a). As summarized by Senator Borah, a member of the Judiciary Committee (App. 18a)

> this measure. . . . gives them a status of their own, fixes a different method of proceeding, and absolutely deprives the court, in the first instance, of examining into the question of whether or not they have violated the law. . . . it is proposed not to exempt them and leave no remedy at all, but to exempt them and provide another tribunal before which they can have their hearings.

Representative Volstead similarly observed that (App. 12a)

> as we are granting these associations much larger powers than they had under the Clayton Antitrust Act, it was thought that they ought to be put under some supervision, because there had been complaint against some of these associations, and it was for that reason section 2 was drawn.

The evil that proponents of Capper-Volstead wanted to guard against was that a monopoly by farmers might raise prices too high. The House Reports in both Congresses stated that Section 2 "gives the Secretary of Agriculture power to prevent these associations from exploiting the public" (App. 8a, 20a). And Senate Report 236 of the 67th Congress stated that Section 2 of the House bill had as its purpose (App. 27a)

> the alleviation of the evils of monopoly, or those that may follow from authorized combinations, by the granting of something like supervisory control to the Secretary of Agriculture.

These references were to the fact that Section 2 limited monopolistic cooperatives at the point at which they unduly enhanced prices. A cooperative which the Secretary of Agriculture found to have crossed that line was to be subject to the same equitable sanctions as any other monopoly under the antitrust laws (App. 40a, 43a-44a).

This special antitrust procedure for cooperatives struck at the principal evil of monopoly. As explained by Senator Kellogg, leader of its proponents in the Senate, Section 2 contained (App. 28a)

> features for the protection of the public in the event that any restraint of trade or monopoly unduly enhances prices, for, after all, the principal

> object of the Sherman Act is to prevent great organizations of capital and business from getting control of the business of the country and enhancing prices to the damage of the public.

Because it thus outlawed the ultimate objective of restraints of trade, the proponents of Capper-Volstead did not look upon it as giving farmers a special privilege. Chairman Volstead made this very point when he described the remedy provided in Section 2 as giving "to these organizations a status of equality with other business concerns, and that is all the farmers ask" (App. 25a). He explained this "equality" by noting that (App. 25a)

> in the event that there is a complaint against them they will not be subject to criminal prosecution if their organization is permitted by this bill, but an investigation will be had before the Secretary of Agriculture, who is given power to deal with the matter. Corporations are very seldom indicted but proceeded against in a civil action substantially the same as we authorize against these associations.

The fact that farm cooperatives would be subject to special antitrust proceedings which could culminate in the application of full Sherman Act relief in part explains the statement in House Report 24 of the 67th Congress that (App. 21a)

> In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.

Any notion that this language was meant to imply that cooperatives were to be subject to the same antitrust proceedings as are business corporations would be clearly in error. In debate, Congressman Mills took issue with this statement of the Report, showed how the authorization of Section 1 was far broader than that conferred on any corporation, and concluded that (App. 22a):

> It is possible, if it is the intent of the framers of this bill, to simply permit the formation of an association or corporation for the purpose of marketing, to say specifically in this bill that the other provisions relating to what these associations shall do after they are formed shall be subject to the provisions of the Sherman Antitrust Act.

Moreover, if Capper-Volstead did no more than place farmers on a par with corporations, it would have been meaningless legislation since Section 6 of the Clayton Act, whatever its shortcomings as an exemption statute, had already done this.

The legislative history makes it plain that both supporters and opponents of the bill agreed that the purpose of Section 2 was to preclude antitrust prosecution of cooperatives by any other means. Opponents objected that the bill would "take from the courts the right of initial proceeding" against cooperatives (App. 13a) and place the decision whether or not to prosecute in the hands of the Secretary of Agriculture, "the guardian angel of the farmers of this country" (App. 11a). Letting the Secretary "determine whether or not a violation in restraint of trade or unfair dealing is had" instead of maintaining the jurisdiction of the antitrust laws, they said, would serve only to avoid the scrutiny and evade the standards which those laws

require (App. 13a-14a). As stated by Senator King, a member of the Judiciary Committee, it would deny (App. 29a-30a)

> the right of the Attorney General to initiate proceedings, even though he should believe from uncontrovertible evidence that a monopoly stupendous in character and oppressive in results exists by reason of combinations of the character contemplated.

The opponents were not exaggerating the consequences of the bill. House Report 24 in the 67th Congress stated that the "bill directs the Secretary of Agriculture to supervise these associations," because "his department is thoroughly familiar with the needs and difficulties under which [these associations] always have a struggle" (App. 20a). Congressman Sumners, a member of the Judiciary Committee, advised the House (App. 24a):

> It is a choice between giving the Secretary of Agriculture, the Department of Commerce, or the Department of Justice original supervision. The farmers prefer the Secretary of Agriculture, and I see no reason why the public should object to his designation.

The greater competence of the Secretary of Agriculture to deal with farmers was discussed at length (App. 20a, 29a, 45a-46a). The importance of having the Secretary act before the Attorney General would be permitted to take charge in court was carefully explained by Senator Kellogg (App. 28a-29a):

> . . . the Attorney General has not the machinery to study these cooperative associations, to find out the cost of production, the cost of selling, the reasonable prices to the consumers, and various

other elements which it is easy for the Secretary of Agriculture to find out.

It may be said, therefore, that before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly or not, the Secretary of Agriculture must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices.

The Attorney General could, however, "prosecute suits instituted by the Secretary of Agriculture" (App. 30a).

The conflicting attitudes expressed above were reflected in the actions that Congress took. The Senate committee's recommendation that Section 2 be deleted and replaced by Senator Walsh's antimonopoly amendment (App. 26a), designed to retain the power of the Attorney General to proceed against monopolistic cooperatives, was rejected decisively by the Senate (App. 47a). In addition, the proposal to replace the Secretary of Agriculture by the Federal Trade Commission (App. 17a, 45a-46a) in the regulatory scheme of Section 2 was rejected by voice vote (App. 46a). The votes on these two issues by the Senate in the 67th Congress, reversing the positions that chamber had taken in the prior Congress (App. 20a), brought it into accord with the House and enabled Capper-Volstead's exclusive procedure for regulating cooperatives to become law.

This then is the meaning of exemption. The Capper-Volstead Act was designed to free the collective marketing activities of farmers from all possibility of antitrust prosecution, particularly criminal, by the Department of Justice. The fact that such activities

might monopolize or restrain trade was acknowledged. But Congress, regarding the undue enhancement of prices as the ultimate danger at which the Sherman Act was aimed, vested the Secretary of Agriculture with exclusive original jurisdiction to act if monopoly or restraint by a cooperative raised prices unduly. If the Secretary found that it did, the complete arsenal of equitable relief available under the Sherman Act could then be brought to bear by the Attorney General in seeking to enforce the order of the Secretary of Agriculture in a district court. Thus, the most feared evil of Sherman Act monopoly was forbidden and full Sherman Act relief was provided. For this reason, a declaration that the antitrust laws were not to apply to the cooperative activities of farmers would have been inconsistent with Capper-Volstead's purpose.

(3) Vertical Integration

To enable farmers to raise prices and better their own lot in the market, Section 1 of the House bill specifically authorized vertical integration of the entire marketing process under farmer control. Consequent elimination of the middleman was an open objective (App. 10a, 11a, 24a). As spelled out by a member of the House Judiciary Committee (App. 10a):

> Cooperative farmers' organizations will bring producers and consumers closer together. The excessive charges of unnecessary middlemen will be eliminated, and the cost of marketing, manufacturing, and distributing farm products will be greatly reduced. The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. Prices will be stabilized . . .

Opponents objected that the bill not only allowed cooperatives to take the form of monopolies in production "but in 'processing', in handling, and in placing the products, raw or finished, upon the market" as well (App. 18a). Senator Capper declared that this was necessary to achieve the bill's goal since "no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates" (App. 31a). If farmers did not so market collectively, he explained, "they cannot market at all" but must usually turn their products over to middlemen.

Even the opposition to the bill took no issue with vertical integration by cooperatives. Said Senator Walsh, Judiciary Committee Chairman (App. 34a):

> . . . both bills would authorize the organization of associations among farmers to make butter of their product or to make cheese of their product or to make condensed milk of their product, and to put the product on the market.

Such ends were desirable, he indicated (App. 38a-39a):

> We want to allow a lot of farmers, instead of bringing their milk into a cheese factory run by private capital, selling their milk to the corporation which runs that cheese factory, to be permitted to associate themselves together—which, of course, would eliminate competition between themselves—build their own cheese factory, bring their milk to that cheese factory, sell the cheese and divide the profits. That is what this bill is for.

In fact it was because of this authorization that Senator Walsh was so anxious to forbid monopoly (App. 39a):

> Let us turn again to the milk producers in the State of Virginia and in the State of Maryland. They do not resort to any unfair practices at all. They simply organize themselves, and they all unite in one association under the protection of this act; they set up their own distributing system in the city of Washington.
>
> Of course, the private distributors must go out of business. They can not any more get any milk from anybody, at least unless they go beyond the territory which would ordinarily supply the city of Washington, and, of course, they must compete under disadvantageous circumstances, and they would naturally fall.

But the 67th Congress chose not to bar such an eventuality unless it resulted in unduly enhanced prices (App. 47a). Accordingly, cooperatives were authorized, subject to Department of Agriculture supervision, to integrate vertically and supplant the private distributor.

In 1922, the Capper-Volstead Act authorized by Section 1 the vertical integration of farmer cooperatives which are permitted to monopolize the marketing of their product, subject to the standards of Section 2. Twenty-eight years later this authorization was reaffirmed.

C. Capper-Volstead Reflected: The 1950 Amendment to Section 7 of the Clayton Act

In 1950, Section 7 of the Clayton Act was amended to bring within its coverage acquisitions of assets having stated anticompetitive effects. 64 Stat. 1125, 15 U.S.C. § 18. Consistent with, and at least partly in recognition of the intent and scope of the Capper-Volstead Act, two separate provisions of that amend-

ment serve to exclude acquisitions by Capper-Volstead cooperatives from the ban of Section 7. Amended Section 7 provides in the first paragraph that

> no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation. . . .

and in the last paragraph that

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

1. "Subject to the Jurisdiction of the Federal Trade Commission"

The first part of the amendment excludes corporations which are not subject to Federal Trade Commission antitrust jurisdiction because those corporations have already been placed under the supervision of a specialized administrative agency. In the case of agriculture, as we have previously seen, the Capper-Volstead Act was specifically drafted so as to remove farmer cooperatives from the Sherman and Clayton Act jurisdiction of both the Department of Justice and the Federal Trade Commission, and an amendment to restore the Commission's role vis-a-vis cooperatives was expressly rejected by the Senate in the 67th Congress (App. 46a). For this reason alone, cooperatives

under the jurisdiction of the Secretary of Agriculture are not "subject to the jurisdiction of the Federal Trade Commission" and are thus not answerable to the asset acquisition provisions of Section 7 of the Clayton Act.

2. "Authority Given by the Secretary of Agriculture"

But the amendment went further and by its last paragraph affirmatively excluded transactions "consummated pursuant to authority given by" any of the designated agencies, "under any statutory provision vesting such power" in the agency. The seventh listed agency is the Secretary of Agriculture. Since no United States statute confers express authority on the Secretary of Agriculture to give advance approval to an acquisition of assets, inclusion of the Secretary is meaningless without reference to the Capper-Volstead Act. That Act confers express authority on farmer cooperatives to make contracts necessary to carry out any of the vertically integrated functions of marketing their products. Contracts to acquire assets to be used in carrying on such functions are manifestly included. Where any such acquisition results in monopolization or restraint of trade by the cooperative with the effect of unduly enhanced prices, it must be challenged by the Secretary of Agriculture under Section 2 of the Capper-Volstead Act. Accordingly, asset acquisitions by farmer cooperatives are in a very real sense transactions which are consummated under the authority given by Section 1 of the Capper-Volstead Act itself, subject to challenge by the Secretary of Agriculture under power vested in him by Section 2 of that Act.

That this is the precise reason why the Secretary of Agriculture was included in the last paragraph of Section 7 is demonstrated by recourse to the legislative history of the 1950 amendment. The original text of H.R. 515, the bill introduced in the First Session of the 80th Congress to amend Section 7 of the Clayton Act, contained no reference to transactions under the authority of the Secretary of Agriculture. Its last paragraph mentioned only the Civil Aeronautics Authority, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, Securities and Exchange Commission and Surplus Property Board. In the course of hearings before the House Judiciary Committee, however, compelling testimony regarding agricultural cooperatives was given by Charles W. Holman, Secretary of the National Cooperative Milk Producers Federation. Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives (80th Cong., 1st Sess.) on H.R. 515, pages 101-104. Holman stated that his organization represented 83 farmer-owned and farmer-controlled dairy cooperatives collectively owning approximately 800 dairy plants, and that he was appearing in opposition to H.R. 515 insofar as it might apply to acquisitions of marketing facilities by cooperatives subject to the Capper-Volstead Act. Such application, he told the Committee, "would stifle the normal growth of our farmer-owned dairy cooperative marketing associations" (Hearings, p. 101). Holman traced the history of the application of the antitrust laws to agricultural cooperatives, stating that the Capper-Volstead Act was "in effect an amendment to the antitrust statutes" which "authorizes and sanctions the elimination" of competition among farmers

"as well as setting up an agency for prevention of monopolistic tendencies contrary to public interest" (Hearings, p. 103). He gave several examples, including (p. 103):

> Let us take the case of a cooperative milk marketing association which is exercising the dual function of distributing milk either wholesale or retail or both, and acting as a bargaining agent for its members. In doing so it supplies a number of dealers on the market with all or part of their milk and cream needs. Let us suppose that one of the dealers to whom the cooperative has been furnishing milk desires to retire from business and offers to sell his plant and facilities. In order to guarantee an assured continued outlet for the milk of its members, the cooperative might purchase these assets, but under H.R. 515 might be held in violation of the Clayton Act.

Holman then asked the Committee to amend H.R. 515, stating (pp. 103-4):

> The legislation proposed to this committee may not be aimed at agricultural cooperatives. Yet the bill, as drawn, is subject to interpretations which would nullify rights accruing to farmer cooperatives under the Capper-Volstead Act, would wipe out the power of the Secretary of Agriculture, a technically informed and naturally understanding agency, to determine whether cooperative activities have begun to run counter to public interest, and relegate farmers to the conditions of uncertainty which prevailed prior to the passage of the act.

Following the hearings at which Mr. Holman testified, H.R. 515 was amended by the Committee and

reintroduced as H.R. 3736. The Committee's report stated (H. Rep. 596, 80th Cong., 1st Sess., p. 1):

> The bill was originally introduced as H.R. 515. Extensive hearings were held thereon by Subcommittee No. 2 of the Judiciary Committee. Amendments were adopted to H.R. 515 and the bill as amended reported as H.R. 3736.

Among the amendments made by the Committee was the addition of the Secretary of Agriculture to the agencies listed in the last paragraph of Section 7.

H.R. 3736 did not reach the floor in the 80th Congress, but in the 81st Congress, a substantially identical bill, H.R. 2734, was introduced. It too included the Secretary of Agriculture in the last paragraph of Section 7. This feature was not discussed in debate (95 Cong. Rec. 11484-11507; 96 Cong Rec. 16433-57, 16498-16508). The Senate Report merely paraphrased the last paragraph's language (S. Rep. 1175, 81st Cong., 2nd Sess., p. 2). But the Report of the House Committee on the Judiciary, the Committee which had heard Holman's testimony and thereafter amended H.R. 515, stated (H. Rep. 1191, 81st Cong., 1st Sess., p. 6):

> The last paragraph of section 7 is new. It simply provides that provisions of the bill should not apply to corporations coming under the jurisdiction of ICC, CAA, FCC, FPC, SEC, and the Secretary of Agriculture. These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them.

Against this background, it is clear that the Capper-Volstead Act was deemed by Congress to confer the authority referred to in the last paragraph of Section

7. This conclusion gives meaning to Section 7's otherwise inexplicable reference to the Secretary of Agriculture in accord with the canon that a statute should be "so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Ex Parte Public National Bank*, 278 U.S. 101, 104 (1928). The last paragraph of Section 7 grouped seven specialized administrative agencies, each having its own individual statutory procedures, into one brief descriptive sentence. The plain and salutary purpose of the paragraph was to preserve the exclusive merger and acquisition review authority which had previously been vested in those agencies. That purpose should not be thwarted in the case of agriculture simply because the few words the draftsmen used to summarize the techniques of agency review do not describe precisely all seven separate statutory schemes.

3. Incipient Violation of Inapplicable Law

Of paramount importance in any appraisal of amended Section 7's effect on Capper-Volstead cooperatives is the question of the antitrust objective involved. Section 7 of the Clayton Act outlaws those acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." The avowed purpose of Section 7, "as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S. Rep. 1775, 81st Cong., 2d Sess., pp. 4-5. But the Capper-Volstead Act, as we have seen, permits farmer cooperatives to monopolize and restrain trade without fear of Sherman Act prosecution as

such, subject only to initial proceedings by the Secretary of Agriculture. Accordingly, it would hardly make sense to measure the anticompetitive effects or tendencies of a cooperative's acquisition by the standards of Section 7 of the Clayton Act when, fully ripened, those same effects would not "justify a Sherman Act proceeding." In fact, because of the authorization of cooperative monopoly by Capper-Volstead, the vertical acquisition of marketing facilities by any substantial cooperative is likely to violate the competitive standards of Section 7. The Holman testimony indicated that this was a matter of real concern to cooperatives. Such a result could only be attained, however, by applying Section 7 of the Clayton Act, as amended, in a manner contrary to its first paragraph, its last paragraph, and the language of Section 1 of the Capper-Volstead Act.

D. The Legal Significance of Capper-Volstead

The Capper-Volstead Act, in both procedural and substantive respects, substantially modified the application of the antitrust laws to agricultural cooperatives which act apart from combination or conspiracy with outsiders. Substantively, it immunized monopolization or restraint of trade unless prices were unduly enhanced. Procedurally, it eliminated the dual system of enforcement by the Federal Trade Commission and the Department of Justice and substituted an exclusive unified procedure by which the Secreary of Agriculture could initiate, and the Department of Justice could enforce, antitrust action against cooperatives.

By these modifications the 67th Congress tailored a system of limited antitrust enforcement to the peculiar needs of a segment of the economy in which

competition as such is a curse. In sum, the purpose of Capper-Volstead as well as its method are unique and unprecedented. They stand in bold contrast to special legislation of prior and later Congresses in which this Court, after careful study of the legislative history, has concluded that no modification of substantive law was intended.

In *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196 (1945), this Court ruled that Section 5 of the Webb-Pomerene Act, a product of the 65th Congress, did not preclude the Department of Justice from instituting antitrust proceedings against export associations prior to investigation by the Federal Trade Commission. Although Section 5 contained no such restriction, petitioners argued that it was implied from the structure of the Act. This Court, however, found no such implication in the words, the setting or the legislative history of Webb-Pomerene. The authority conferred on the Federal Trade Commission was confined simply to investigating, recommending and reporting; and its recommendations were to be referred to the Attorney General "for such action thereon as he may deem proper." The Commission could make no order, enforce no law, impose no prohibition against violations. It could do no more than "render a useful service in bringing violations to the attention of the Department of Justice" or show "that resort to the courts is unnecessary." 325 U.S. at 208. Further, the Court found nothing in the "legislative history to show a Congressional purpose to restrict the authority of the United States to maintain suits for every kind of violation of the antitrust laws." 325 U.S. at 210. It concluded that the absence of any "extended discussion of the matter was in itself per-

suasive evidence" of no purpose to repeal any part of the Sherman Act, and that (325 U.S. at 211)

> Congress's clear purpose to insure continued and vigorous application of the antitrust laws to domestic restraints of trade, notwithstanding the Webb-Pomerene Act, is shown by the Committee Reports as well as by statements of the sponsors of the legislation on the floors of Congress, and is a strong indication that there was no thought of depriving the Attorney General of any of his powers to prosecute antitrust suits.

Juxtaposing this analysis of the Webb-Pomerene Act with what we have seen in Capper-Volstead offers a powerful contrast indeed. "Extended discussion" of the entire monopoly problem and of "depriving the Attorney General" of his power to initiate Sherman Act prosecution of cooperatives was at the very heart of debate in two Congresses. By its votes on specific proposals, the 67th Congress specifically indicated its intent to modify conventional antitrust standards for cooperatives, and to remove the threat of prosecution by the Attorney General. Far from being confined to the mere reporting function of the Federal Trade Commission in the Webb-Pomerene Act, the Secretary of Agriculture was vested with full power to serve formal complaints; to adjudicate whether a cooperative had monopolized or restrained trade and, if so, whether prices had been unduly enhanced; to issue orders against monopolization and restraint; and to have his orders enforced with full Sherman Act scope by the Attorney General in a district court.

It is of no significance to this case that the *Alkali* opinion analogized its ruling on Webb-Pomerene to the analysis of Capper-Volstead made in *United States*

v. *Borden Co.*, 308 U.S. 188 (1939). In context, that analogy was wholly proper. Chief Justice Stone stated that *Borden* rejected the contention that the Secretary of Agriculture's jurisdiction was exclusive "because [the cooperative] went beyond the immunity granted by the Capper-Volstead Act." 325 U.S. at 210. The accuracy of that statement cannot be doubted since the decision in *Borden* hinged, as the Government has conceded (J.S. No. 73, p. 9), on the cooperative's conspiracy with outsiders, conduct which the 67th Congress never intended to protect. But no study of the formulation of Capper-Volstead could possibly conclude that its application to nonconspiring cooperatives was patterned after or resembled in intent or design the provisions of the 65th Congress' Webb-Pomerene Act.[8]

Not all interpretations of federal law have rejected findings of implicit immunity. Only last Term this Court again faced the question, in a non-antitrust context, whether immunity from suit could be implied from a federal statute which did not in terms provide for it. In *Farmers Educational and Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959), a key issue was whether Section 315 of the Federal Communications Act of 1934 granted to stations which cannot censor broadcasts a federal immunity from liability for libel. A majority of the Court felt compelled by "traditional concepts of fairness" to find such immunity implicit in the statute despite a "contra-

[8] See also the reliance placed on legislative history to resolve questions of antitrust jurisdiction in *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959). In that case the legislative history demonstrated no intention to depart from traditional antitrust enforcement.

dictory legislative background" in which "some of the history supports [the] inference" that Congress did not intend to grant immunity. 360 U.S. at 531, 533. Four members of the Court dissented, declaring that an "implied grant of immunity" was impossible to find, even "between the lines." This view was based on the fact that "an express provision granting such immunity was excised from the bill" and repeated attempts later to replace it all failed. 360 U.S. at 536. No such ruling would be appropriate here. The legislative history of the Capper-Volstead Act, and in particular the rejection after great controversy of an express provision which would have denied immunity from antimonopoly law as such abundantly meets the standard set forth by the minority in *WDAY*.

For all of the foregoing reasons we believe that upon the showing that the only defendant was an authorized Capper-Volstead cooperative (R. 126) the amended complaint's charge of violation of Section 2 of the Sherman Act was properly dismissed, and the charge of violation of Section 7 of the Clayton Act should have been dismissed. The alleged violations of Sections 1 and 3 of the Sherman Act, on the other hand, should have been dismissed upon the failure of evidence or finding as to any conspiracy or combination with outsiders (R. 504). Such dismissals are required by the Capper-Volstead Act, which, as its history so clearly discloses, was intended to exempt non-conspiring farmer cooperatives from antitrust prosecution by the Department of Justice, except in accordance with the procedure set forth in Section 2 of that Act.

II. THE AUTHORIZED ANTICOMPETITIVE CHARACTER AND PURPOSE OF FARMER COOPERATIVE ACTIVITY PRECLUDES APPLICATION OF CONVENTIONAL ANTITRUST STANDARDS

Capper-Volstead formulated a charter for agricultural cooperation. In the years that followed, specialized agencies to work with cooperatives, special legislation to assist them in coping with competitive problems, and special procedures by which the government itself could regulate competition if cooperatives themselves could not control it, were all fruits of continuing congressional concern. Such statutes do more than contradict the very premises upon which the antitrust charges in this case are based. They provide in addition the authority upon which many of the Association's activities here specifically rested.

A. Special Agricultural Statutes

1. The Cooperative Marketing Act of 1926

In 1926 the Cooperative Marketing Act authorized the creation of a Division of Cooperative Marketing in the Department of Agriculture. 44 Stat. 802; 7 U.S.C.A. § 452, note. The Division was directed to render a wide variety of services to producer associations "engaged in the cooperative marketing of agricultural products, including processing, warehousing, manufacturing, storage, the cooperative purchasing of farm supplies, credit, financing, insurance, and other cooperative activities." 7 U.S.C. § 453(a). It was authorized to conduct economic studies in all phases of cooperation, to assist cooperatives in developing methods of business and market analysis, to aid individual producer groups by analyzing facts surrounding the production, pricing and marketing of their products, and in general to promote the knowledge of cooperative

principles and practices. 7 U.S.C. § 453(b). All such information was made freely exchangeable by farmers, cooperatives and their federations. 7 U.S.C. § 455. Compare *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921).

After having been transferred from the Department of Agriculture to the Federal Farm Board for several years, the Division was returned to the Department in 1939, where it remains today under the direction and supervision of the Secretary of Agriculture as the Farmer Cooperative Service. 7 U.S.C.A. § 452, note. It is this Service which, as we shall show below, has effectively stimulated the growth in size and power of farmer cooperatives.

2. The Agricultural Marketing Act of 1929

Three years later, in 1929, the Agricultural Marketing Act declared, in Section 1, that it was the policy of Congress to promote "the effective merchandizing of agricultural commodities" and "to protect, control, and stabilize" the currents of commerce in the marketing of such commodities. 46 Stat. 11, 12 U.S.C. § 1141(a). In the realm of antitrust such language marks an enemy. No concepts could be more at war with competition than those of protecting, controlling or stabilizing trade and commerce. In the world of industry, notions such as these are thought of as stifling initiative, retarding progress and preventing the benefits of quality and price from reaching the consumer.

Section 1 further prescribed that the policy of Congress towards agriculture should be carried out by (1) "minimizing speculation," (2) "preventing inefficient

and wasteful methods of distribution," (3) encouraging "greater unity of effort in marketing" by producer organizations, (4) "promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations," and

> (5) "aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantgeous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity." 12 U.S.C. § 1141(a).

For industry, in contrast, it is competition rather than stability that eliminates "wasteful methods of distribution" and prevents surpluses. And lower prices are one of the goals toward which industrial competition strives, rather than one of the evils which it seeks to eliminate.

Section 7 of the Marketing Act proceeded to authorize the Federal Farm Board, now the Farm Credit Administration, to make loans to eligible farmer cooperatives for the "construction or acquisition by purchase or lease . . . of physical facilities," where such loans would be in "furtherance of the policy declared in Section 1" and where the purchase price was found to be "reasonable." 12 U.S.C. § 1141e. The lending authority of the Agricultural Marketing Act was vested by the Farm Credit Act of 1933 (48 Stat. 257) in regional banks for cooperatives, 12 U.S.C. § 1134c, established for that purpose by the Governor of the Farm Credit Administration, 12 U.S.C. § 1134, and enjoying the legal status of "instrumentalities of the United States." 12 U.S.C. § 1138c.

Thus in the 1929 Marketing Act, Congress not only declared a comprehensive anticompetitive policy for the marketing of agricultural products but authorized the use of federal funds to promote it.

3. The Agricultural Marketing Agreement Act of 1937

On June 3, 1937 Congress passed the Agricultural Marketing Agreement Act upon a finding that the disruption of the orderly exchange of agricultural commodities "impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure." 50 Stat. 246, 7 U.S.C. § 601. That Act, as amended, spells out further techniques for controlling the marketing of farm commodities.

Section 608(b) of Title 7 provides that the Secretary of Agriculture shall have the power to enter into marketing agreements with processors, producers, cooperatives and others engaged in the handling of agricultural commodities. In cases where a marketing agreement cannot be reached, the Secretary is authorized, upon the vote of a sufficient number of producers, to issue orders regulating the handling of agricultural commodities. 7 U.S.C. § 608(c)(1). Relevant to this case, such orders may classify milk according to use and fix "minimum prices for each such use classification which all handlers shall pay . . . for milk purchased from producers or associations of producers." 7 U.S.C. § 608(c)(5)(A). Capper-Volstead cooperatives are authorized to adopt a blend pricing system for the purpose of distributing the proceeds to members, but are forbidden to sell milk to any handler at prices less than the fixed minimum. 7 U.S.C. § 608 (c)(5)(F). Marketing orders may also prohibit

"unfair methods of competition and unfair trade practices" in the handling of a commodity. 7 U.S.C. § 608(c)(7)(A). The Act also requires the Secretary to (7 U.S.C. § 610(b)(1))

> accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

The Agricultural Marketing Agreement Act thus afforded cooperatives a federal ally in raising the returns to its producers if self-help methods should fail.

B. Federal Administrative Policies in Agricultural Cooperation

Under the stimulus of the foregoing statutes, the federal government has consistently encouraged the spread of cooperative ventures in agriculture. Through the assistance and promotional activities of the Farmer Cooperative Service, the lending authority of the Agricultural Marketing Act and the issuance of Federal Marketing Orders, cooperatives have been urged to expand, both horizontally and vertically, and to take other steps designed to overcome the ravaging effects of competition. The helping hand of federal authority has been extended in virtually every phase of agriculture; we emphasize the dairy field only because of its particular relevance to this case.

1. Size and Power

Federal farm agencies have consistently emphasized the need for cooperatives to grow in size and market power. As early as 1930, the Federal Farm Board,

reporting on its operations under the Agricultural Marketing Act, stated:[9]

> The new law, passed in June, 1929, has intensified the farmer's interest in cooperative marketing. Farmers are gradually controlling a greater volume of their products as they move through marketing channels to the processor or ultimate consumer. By collective action, growers are extending their marketing system, strengthening their position in bargaining on central markets, developing a credit system that will make them more independent, and improving their chances of adjusting production to prevent troublesome surpluses.

The Board characterized the Act as "a law designed to give farmers governmental aid in order that they may help themselves," and declared its policy with regard to large farmer organizations:[10]

> In general, central marketing is being developed under a plan whereby each cooperatively handled commodity of the country will be under the control of a single farmer-owned and farmer-controlled organization, thus giving growers a chance to have something to say about the selling price of their products . . .
>
> It is the policy of the Federal Farm Board to approve and to support only one national commodity-selling plan and organization. This is done in order to bring a large volume of a commodity under the control of one management, to avoid dupli-

[9] *Farmers Build Their Marketing Machinery: The Agricultural Marketing Act Helps in Developing Cooperative Program Open to All Growers* (Federal Farm Board Bulletin No. 3, December 1930), at 1-2.

[10] Id. at 2.

> cation of cooperative marketing facilities, and to eliminate the wasteful competition that naturally develops where there is more than one central agency.

The Board stressed that cooperatives handling the same commodity should consolidate, expressing the ultimate objective as follows:[11]

> Eventually, this is expected to do away with competition among cooperatives handling the same commodity. With the majority of producers inside the master commodity circle, where the sales are controlled by a single national marketing organization, farmers may be able to put agriculture on a basis of economic equality with other industries.

As illustrative of the Agricultural Marketing Act's impact on milk, the Board noted that producers in New England were currently "working on a plan for formation of an overhead milk bargaining association for all the New England states except Connecticut."[12] These early policies of the Federal Farm Board are continuing today under its successor, the Farm Credit Administration.[13]

The objectives of size and power also keynote the advice which the Farmer Cooperative Service, in carrying out its statutory responsibilities, has given to

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[11] Id. at 4.

[12] Id. at 44.

[13] See statement of R. B. Tootell, Governor of the Farm Credit Administration, made before the American Institute of Cooperation (Farm Credit Administration Release, August 25, 1958).

cooperatives through the years. In the words of its Administrator, Joseph G. Knapp:[14]

> Cooperatives *must* become larger and stronger. Small cooperatives, no matter how efficient, cannot meet the needs of our present large scale agricultural and industrial economy.

The Farmer Cooperative Service has urged dairy cooperatives in particular, to merge into "combinations of larger operating units." "Willingness to clearly and forcefully discuss mergers," the Chief of the Dairy Branch has stated, can lead to a "stronger organizational base" and "make possible much more effective bargaining and merchandising programs."[15] The effectiveness of governmental encouragement of dairy cooperative growth is reflected in statistics recently reported by the Dairy Branch of the Farmer Cooperative Service. These figures show that in 1957 dairy cooperatives marketed almost 60 percent of all whole milk sold by farmers to plants and dealers in the United States.[16]

2. Vertical Integration

Federal farm agencies have encouraged and promoted vertical as well as horizontal growth by co-

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[14] Knapp, *Co-op Musts to Set the Pace*, in News for Farmer Cooperatives, p. 5 (August 1958). This magazine is published monthly by the Farmer Cooperative Service, U.S. Department of Agriculture.

[15] Krause, *Dairy Co-ops Moving to Meet the Test*, in News for Farmer Cooperatives, pp. 7, 27 (January 1959). See also *Cooperatives and Agricultural Integration*, a compilation of integration articles from the News for Farmer Cooperatives, contained in Reprint 150, Farmer Cooperative Service (February 1958).

[16] Gessner and Krause, *Dairy Cooperatives Report on Integrated Activity*, in News for Farmer Cooperatives, p. 12 (February 1959).

operatives. With regard to integration, the Federal Farm Board in 1930 reported:[17]

> In aiding dairy cooperatives in building larger marketing units, the Federal Farm Board realized that local cooperative creameries and cheese factories are absolutely fundamental in the development of a more effective merchandising program. Therefore, wherever it is possible, definite assistance is being extended to the local cooperative organizations.

More recently the Administrator of the Farmer Cooperative Service warned that "if the farmers do not effectively integrate they will be effectively integrated."[18] The policy of the Farmer Cooperative Service is typified by its recent statement to Congress in support of its request for funds:[19]

> Farmer Cooperative Service is receiving increased requests to help cooperatives on their problems in developing better integrated and stronger organizations to give farmers increased bargaining power, greater operating efficiency, and other large-scale organizational advantages.

On August 25, 1958, the Secretary of Agriculture in a speech to the annual meeting of the American Insti-

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[17] Federal Farm Board Bulletin No. 3, *supra* note 9, at 46. See also the statement of the General Counsel of the Federal Farm Board before the American Institute of Cooperation, *Financial Structure of Cooperatives*, p. 3 (Federal Farm Board Circular No. 4, June 1931).

[18] Knapp, *The Test of Farmer Cooperatives*, in News for Farmer Cooperatives, p. 3 (January 1959).

[19] Hearings Before Agriculture Subcommittee of the Commmittee on Appropriations, House of Representatives, 86th Congress, First Session, pp. 1011, 1013 (March 3, 1959).

tute of Cooperation[20] implored cooperatives to develop effective bargaining power through vertical integration. While many cooperatives were "making notable progress in integration and consolidation," the Secretary stated, "advances have been hesitant rather than bold, halting rather than aggressive." He challenged cooperatives "to get off the defense and to get out in front," stating that[21]

> you have a responsibility to do this. And this responsibility is shared by the State Agricultural Extension Services, the Farmer Cooperative Service, the Rural Electrification Administration, and by the Farm Credit Administration.

"Build your cooperatives bigger," urged the Secretary.

The promotional efforts of the Federal Farm Board, the Farmer Cooperative Service and other farm agencies have had particular impact on vertical integration by milk cooperatives. A bulletin released by the Department of Agriculture in July 1958 reported:[22]

> There is a clear-cut pattern of vertical integration among cooperatives that bottle and distribute fluid milk. These firms provide integration from the pickup of milk at the farm to the display case of the supermarket or to the home doorsteps. An estimated 243 cooperatives bottled and distributed some 3.5 billion pounds of milk in 1956.

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[20] USDA 2364-58, U.S. Department of Agriculture, Office of the Secretary.

[21] Id. at 9.

[22] *Contract Farming and Vertical Integration in Agriculture* (Information Bulletin No. 198, July 1958), at 16.

Statistics reported by the Farmer Cooperative Service disclose that cooperatives now manufacture 58 per cent of all creamery butter, 23 per cent of the cheddar cheese, 74 per cent of the nonfat dry milk, and 70 per cent of the dry buttermilk produced in the United States. Regional breakdowns of these figures show that in many areas cooperatives account for up to 100% of such production and manufacturing.[23]

A major consideration in counseling milk cooperatives to integrate vertically has been the urgent need to meet the surplus milk problem. As the Farmer Cooperative Service has observed:[24]

> One of the bargaining association's most troublesome problems is to dispose successfully of milk it cannot sell for consumption in fluid form. Distributors use only limited quantities of such milk in their regular businesses . . . A surplus that becomes a large proportion of the total milk in a market requires special handling.

In such circumstances, much of the milk may have to be made into manufactured dairy products. This can be accomplished either by selling the surplus milk to specialized manufacturing plants or "in the absence of a better alternative they may establish such plants themselves." There is yet a third alternative:[25]

> In some instances bargaining associations have had to take control of distributing businesses to safeguard producers' interests.

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[23] Gessner and Krause, *Dairy Cooperatives Report on Integrated Activity*, in News for Farmer Cooperatives, p. 12 (February 1959).

[24] Hirsch, *Dairy Cooperatives Help Find Markets*, in Farmer Cooperatives in the United States, pp. 45, 51 (FCS Bulletin 1, December 1955).

[25] Ibid.

3. Pricing Policies

Advice antithetical to principles of competition has also been given in the area of pricing. Thus, the Farmer Cooperative Service has indicated that quantity discounts may be used to lower a cooperative's costs by encouraging exclusive dealing:[26]

> Quantity discounts to wholesale and retail customers should be developed in a sound manner, however. For example, if the revised prices charged to small-volume retail customers are exactly in line with costs during a past period, they may be prohibitively high . . . The optimum pricing plan probably lies somewhere between uniform prices per unit to all customers, regardless of quantity purchased, and a quantity discount plan based entirely on cost as related to quantity delivered.

The special appeal of discount plans not justified entirely by cost savings was said to "encourage the practice of buying from a single distributor [cooperative]."[27]

The Farmer Cooperative Service has counseled milk cooperatives to use a classified use system in order to secure price stability. In a bulletin entitled *Pricing Milk According To Use*, the Service said:[28]

> This study was designed to help dairy cooperatives and others solve problems associated with

[26] Hirsch, *Selling Milk. Ideas for Cooperative Managements*, p. 8 (General Report 20, Farmer Cooperative Service, October 1955).

[27] Ibid.

[28] FCS Bulletin 6, p. iii (Farmer Cooperative Service, June 1955).

> pricing milk according to its use . . . The clearest and most important benefit of use classification is a stable market for milk . . .

Prior to classified use pricing prices dropped precipitously during the heavy surplus season. The "unstable markets and prices" which resulted provided the background for the rise of many producer cooperatives. The Bulletin advised that by combining marketing plans with use classification pricing[29]

> producers can more readily obtain stable markets, equitable distribution of returns, adequate prices, and a basis for orderly bargaining . . . Today class pricing exists in most sizable milk markets and all the Federal order markets.

The Bulletin recommended that cooperatives consider adopting classified use plans when any of four adverse competitive situations exists:[30]

> (1) Producers bargain with dealers, but dealers use reserve milk as a weapon to hold down the price;
>
> (2) Wide price changes occur with little apparent change in other market conditions;
>
> (3) Price wars—caused by the efforts of some handlers to avoid losses on reserve milk bought at a flat price—develop in the market with producers bearing most of the cost; and
>
> (4) Handlers are refusing to receive milk from some producers who have been shipping milk regularly to them.

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[29] Ibid.

[30] Id. at iv.

The injury to cooperatives from disruptive practices was dramatically summarized:[31]

> The actions of nonmember producers and noncontracting dealers sometimes undercut the price structure. Dealers who buy none or only part of their milk from a cooperative may attempt to buy just enough milk for fluid requirements and pay the blend price or slightly above. These dealers can maintain this higher use by careful choice of producers, by raiding cooperative members when milk is needed, and by cutting off unnecessary producers when milk is not needed.
>
> These actions by dealers who do not pay on a class pricing basis may place at a disadvantage members of the cooperatives that do use class pricing. Producers whose milk is sold on a class basis must carry more than their share of the necessary reserve of milk for the market. Their blend price is reduced and the unstable conditions which led to the adoption of class pricing may be repeated.

Counterattack by cooperatives is counseled:[32]

> Cooperatives can use contracts, membership relations programs, and activities to strengthen producer-dealer ties to prevent nonmember producers and noncontracting dealers from breaking down the pricing plan. Activities to help dealers may include quality programs and milk sales promotion. It may sometimes be necessary to obtain a Federal or State order to maintain use classification and an orderly market.

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[31] Id. at 48.

[32] Id. at iv.

And, as the farm agencies have repeatedly stressed, it may be necessary in the face of such disruptive practices for agricultural associations "to take control of distributing businesses to safeguard producers' interest."[33]

C. Monopolization and Farmer Cooperatives

The essence of the charge in this case is monopolization. The Department of Justice has asserted that a farmer cooperative has monopolized and attempted to monopolize the production, distribution and sale of milk, and has acquired distribution facilities with the intent and effect of lessening competition or tending to create a monopoly. The Department of Justice carefully refrains from contending that a cooperative is subject to the Sherman Act if it simply "obtains a monopoly" (J.S. No. 73, p. 9). Instead it argues that the monopoly is forbidden only if it is achieved by "anticompetitive" means or if its power is utilized to "foreclose" competition (J.S. No. 73, p. 11). But no recourse to the shibboleths of a competitive system can hide the fact that Capper-Volstead did not merely validate existing agricultural monopolies; rather, it authorized farmer cooperatives, whether large or small, actively to acquire monopolies in the marketing of agricultural products. Congress thus permitted farmers to do the very thing which controlling antitrust decisions of this Court forbid in other sectors of the economy. To hold those decisions applicable here would effectively repeal the Capper-Volstead Act, reverse the policy of later agricultural statutes and destroy the farmer cooperative movement.

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[33]See Hirsch, note 24 *supra*.

1. The Attributes of Monopoly Power

In *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 57 (1911), this Court traced the meaning of "to monopolize" back to the condemnation in England of those contracts or acts "which were thought to unduly diminish competition and hence to enhance prices." These evils of monopoly have only recently been recalled as the curse against which Section 2 of the Sherman Act was directed. *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 389 (1956). But the actual achievement of these attributes of monopoly is not all that Section 2 of the Sherman Act prohibits. The possession of power, purposefully acquired, is now considered sufficient to violate the Act.

The doctrine of monopoly power is perhaps no more fully articulated in recent times than in this Court's review of controlling cases in *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946). "The material consideration in determining whether a monopoly exists," it declared (328 U.S. at 811),

> is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.

Trade and commerce are thus "monopolized" within the meaning of the Sherman Act (ibid.)

> when, as a result of efforts to that end such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient.

The argument that a combination or a corporation could constitute a monopoly, yet not monopolize in violation of law was effectively torpedoed by *American Tobacco's* endorsement of the Second Circuit's opinion in *Aluminum Company of America* v. *United States,* 148 F. 2d 416 (1945). According to the analysis adopted from *Alcoa,* (1) the mere existence of a monopoly would not constitute exercise of monopoly power "only so long as the monopoly remained wholly inert," (2) a combination of all existing producers in an industry would certainly monopolize the market whether or not they engaged in unlawful trade practices, (3) a combination of only 90 per cent of the producers certainly "would have been to monopolize the . . . market," and (4) the exclusion of competitors at which the Sherman Act aims does not require actual ousting of existing competitors; effective exclusion resulting from the monopoly's size and power previously acquired is sufficient. *American Tobacco Co.* v. *United States,* 328 U.S. at 813-14.

2. The Monopoly Power of a Farmer Cooperative

The classic doctrines endorsed and announced in *American Tobacco* would, if applicable, pronounce a death sentence for the farmer cooperative movement of the past forty years. In response to their statutory authorizations, and to the eloquent and persistent urging of federal agencies, cooperatives have acquired, maintained and utilized market size and power, indistinguishable from that of a monopoly. Competition has been eliminated both horizontally and vertically in the drive to increase efficiency, reduce costs of distribution, stabilize prices and enhance returns to the producer.

Under the rule of *American Tobacco,* the unexercised power to raise prices and exclude competitors at will by itself creates an offense, criminal and civil, against Section 2 of the Sherman Act. Under the Capper-Volstead Act, authority is given for competitors to combine for the purpose and with the power to raise prices; such combinations have the inherent capacity to exclude competitors. In the light of such conflict in statutory objectives, can the Department of Justice be permitted to apply the Sherman Act to a Capper-Volstead cooperative by charging that its lawful monopoly monopolized unlawfully?

Under the Capper-Volstead Act, 100 per cent of the producers serving a market may decide to "pool crops, to fix prices, establish common processing and marketing agencies" (J.S. No. 73, p. 11). Accordingly, they may combine into one cooperative association. By channeling all their produce into facilities built and owned by the cooperative, they will automatically foreclose every middleman in the market. There is thus vested in the control of the one organization the power to raise prices and exclude competition. The market is monopolized. The cooperative's growth and acquisition of monopoly power has taken place strictly within the authority of the Capper-Volstead Act. Yet under the standards of *American Tobacco,* Section 2 of the Sherman Act would be violated.

Can the Department of Justice proceed? An affirmative answer would mark a hasty return to pre-Clayton Act days when combinations of farmers were freely prosecuted or threatened because of their inherently anticompetitive character. Or, does a monopoly achieved by means of Capper-Volstead be-

come indictable only if the cooperative commits a "predatory" act or acquires an outlet serving competing producers? An affirmative reply to this question would create a distinction between good and bad monopolization. There is no such line. Congress "did not condone 'good' trusts' and condemn 'bad' ones; it forbad all." *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 427 (2d Cir. 1945). And the use of antitrust cliches such as "predatory," "exclusionary," "anticompetitive" or "foreclosure" make no sense in the context of statutes designed to promote powerful combinations of producers, to raise and stabilize prices and to eliminate middlemen. Where Congress has authorized farmers to acquire monopoly power, the applicability of antitrust statutes cannot depend on whether the means by which the power is achieved or maintained are "properly" or "improperly" anticompetitive. *Alcoa* held that even the increase of productive facilities to meet expected increase in demand was "exclusionary." 148 F. 2d at 431. Simple refusal by an integrated monopolist to deal with an independent supplier may well foreclose the market and drive the supplier out of business. The impossibility of applying conventional antitrust standards and the irreconcilable clash between antitrust and agricultural policies are illustrated by the complaint in this case.

3. The Complaint in This Case

When the defendant here became a cooperative in October 1923 (R. 566), it controlled through its members at least 85% of the milk supply of the Washington market (R. 568). Over virtually all of the period since that beginning its market share has varied be-

tween 85 and 90% (R. 569). By legal and economic definition, the Association is and always has been a monopoly. Recognizing this fact, the Department of Justice urges this Court to hold that "Aside from the fact that the defendant controlled 86%" of the market (J. S. No. 73, p. 9), the cooperative's alleged monopolization and attempts to monopolize by "anticompetitive" means are unlawful. An analysis of those means is revealing.

a. *Prices*

The amended complaint (R. 12-25) charges that the Association "fixed and maintained arbitrary and noncompetitive prices and terms for the sale of milk" (¶ 22a, R. 17). It also alleges that the Association "charged dealers higher prices" for milk to be resold within the Washington area and "lower prices for milk purchased for resale outside" (¶ 22j, R. 18). The alleged effect of such pricing practices is a "rigid and artificial pricing structure in the sale of milk" in the area, "denying consumers the opportunity to buy fluid milk at prices resulting from free and open competition in the production and sale of milk" (¶ 30h, R. 22).

These allegations, plainly proper in the context of industrial restraints or monopoly, disclose a fundamental ignorance of the very purpose for which Congress created cooperatives. "Free and open competition in the production and sale of milk" is precisely what Capper-Volstead was designed to discourage. And when a combination of producers reaches monopoly size, any price charged is by definition a "noncompetitive" price "fixed" by the force of monopoly power. *American Tobacco Co.* v. *United States*, 328

U.S. at 813. The fact that a cooperative may have charged higher prices for milk to be resold inside its market, and lower prices for outside, would simply mean that some of the milk produced by the cooperative's members became surplus to the monopolized market's requirements and had to be sold in competition elsewhere. The failure of the Department of Justice to recognize the distinction between cooperative-controlled and competitive markets explains in part the amended complaint's allegations of eight instances of so-called "predatory pricing" since 1930 (¶ 22g, R. 18). At least four of these related to situations in which the Association sold its members' milk in competitive markets at prices lower than the Class I price in Washington (¶ 22g, R. 18; g. 4, g. 6, g. 7, g. 8, R. 44).

Significantly, the amended complaint nowhere alleges that the "arbitrary" prices "fixed" by the Association were prices that had been unduly enhanced. Evidence of that would of course have warranted a proceeding by the Secretary of Agriculture in accordance with Section 2 of the Capper-Volstead Act. To the contrary, however, evidence adduced through an official of the Farmer Cooperative Service, Department of Agriculture, affirmatively showed that Washington area prices were "practically the same as other markets in the area" (R. 414). Such evidence was wholly consistent with the finding of the Baltimore Bank for Cooperatives that it had been the Association's policy "to keep price objectives in line with economic conditions, with no attempt to force prices up when not justified by supply and demand conditions" (R. 570).

b. *Competition Among Producers*

A number of sub-paragraphs of the amended complaint charged that the Association eliminated or attempted to eliminate competition with other producers (e.g. ¶ 22b, e, f, i, R. 17-18). The alleged effect of such activities was to substantially lessen or impair competition in the production and sale of milk (e.g. ¶ 30 e, g, i, R. 22).

Such charges again disregard the fact that Capper-Volstead authorized the elimination of competition among producers, and that this result had been substantially achieved long prior to the period involved in this case when competing producers representing 85% of the market voluntarily joined the Association at its inception (R. 568). Moreover, many of the Association's alleged attempts to reduce producer competition relate, as particularized by the prosecution below, to urging governmental authorities to maintain high standards of inspection and quality for milk production by dairy farmers (b. 3, R. 38; e. 10, R. 42; i. 1 and i. 2, R. 55), "as a condition for the sale of their fluid milk in the metropolitan area." See *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 550 (1939). A large number of particulars allege full or minimum supply contracts between the Association and its dealers (R, 36-45). Such agreements, if used, might well be "necessary contracts" within the meaning of Section 1 of Capper-Volstead because of the acknowledged need of the farmer to have an assured outlet or market for his highly perishable product. The Farmer Cooperative Service has counselled the use of quantity discounts toward this end. See page 88, *supra*. Other particulars refer to the Association's

alleged motive in urging amendment of a milk marketing order (i. 5, R. 55), cf. *United States* v. *Rock Royal Co-op.*, 307 U.S. at 559-60, or to agreements on price between the Association and another Capper-Volstead dairy cooperative (c. 1, R. 40). Yet common marketing agencies for cooperatives are expressly authorized by Section 1 of Capper-Volstead, while the Cooperative Marketing Act permits free exchange of price information. 7 U.S.C. §§ 291, 455; *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151 (D. D.C. 1957).

c. Relations With Dealers

Several allegations in the monopolization count charged the Association with "anticompetitive" conduct in relation to dealers or with acquiring or attempting to acquire dealer and manufacturing outlets (¶ 22 d, e, f, h, k, R. 17-18). The effects of such activities were alleged to include increasing the Association's control of the market, eliminating dealers or reducing competition among them, and foreclosing independent producers (¶ 30, R. 21-22). In support of such charges the prosecution cited, in addition to many of the practices previously discussed, specific acquisitions by the Association as well as conduct relating to federal marketing orders.

In particular, it specified the Association's acquisition of Holbrook Farms Dairy in 1941 (d. 1, R. 40), Olney Acres Manufacturing Plant, Laurel, Maryland, in 1955 (d. 4, R. 41); and an attempt to acquire Harvey Dairy, Inc. in 1954 (d. 3, R. 40). But the principal acquisition complained of in the monopolization case was that of Embassy Dairy, Inc. in 1954 (b. 14, R. 40;

d. 2, R. 40; k. 4, R. 57). With the exception of Embassy Dairy, the facts relating to these charges are not in the record because the district court dismissed the Section 2 of the Sherman Act complaint (R. 74-75). The Embassy trial, however, affords an opportunity to consider in detail the nature of a cooperative's "monopolization" by way of acquisition.

In addition, threats by the Association to apply for a federal marketing order were cited (d. 2, R. 40; e. 4, R. 41; k. 5, R. 57). The right of an association of producers to seek the issuance of such orders where competition has disrupted the market is expressly conferred by the Agricultural Marketing Agreement Act of 1937, as amended, specifically upheld by this Court in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939).

4. The Trial of the Embassy Dairy Acquisition

The clash of agricultural and antitrust policies dramatically unfolded in the trials under Section 7 of the Clayton Act and Sections 1 and 3 of the Sherman Act of the Association's acquisition of the assets of Embassy Dairy, Inc. The fact that the Embassy acquisition was prominent among the alleged means of monopolization charged under Section 2 of the Sherman Act and was central to the allegations under Section 7 (¶ 29, R. 21) and Sections 1 and 3 (¶¶ 24-28, R. 18-21) makes it a significant test of the applicability of traditional antitrust standards to a farmer cooperative.

Prior to 1954, there were 12 milk dealers ("dairies," "distributors," "handlers") in the Washington market, all independent of ownership or control by the Association (Gov. Exh. 94, R. 636). Embassy Dairy was the largest of several whose milk was supplied

almost exclusively by non-members of the Association. The Association, prompted by an increasing surplus problem, solicited Embassy as a Class I customer (R. 382). Embassy refused to buy at prevailing Association prices but counteroffered to sell its whole business (R. 384). The proposition was attractive, particularly since the instability of prices, due in large part to Embassy's use of cheap milk from outside the market, was of grave concern to the Association. Since it had but two alternatives in the situation, i.e. "Acquire ownership of the business, or ask for a Federal Order in the Washington market" (Gov. Exh. 25, R. 557), the Association elected to buy Embassy.

The federal statutory and administrative impetus for such a decision by the Association was overwhelming. The basic charter for the move was Section 1 of the Capper-Volstead Act which authorized farmers and dairymen to "act together in . . . collectively processing, preparing for market, handling, and marketing" their products. The right to "make the necessary contracts and agreements to effect such purposes" plainly drew no distinction between building new facilities or buying existing ones.

In addition to this authorization the Association needed money. The Agricultural Marketing Act and the lending agencies created to execute its mandate filled that need. The Act directed the Farm Credit Administration to lend funds to cooperatives for the "construction or acquisition" of processing and marketing facilities. See page 79, *supra*. Accordingly, the Association applied to the Baltimore Bank for Cooperatives for a loan of several million dollars with which to buy Embassy (R. 558). The Bank, as well

as the Farmer Cooperative Service of the Department of Agriculture, thoroughly investigated the transaction. Both agencies found that alleviation of the surplus problem, elimination of price cutting and enhancement of returns to producers were factors "favorable" to the transaction (Gov. Exh. 27, R. 574, 576; Def. Exh. 19, R. 713, 715). Federal agricultural law made them so. In the administration of the Capper-Volstead and Agricultural Marketing Acts, the stabilization of marketing, the management of surpluses, and the prevention of "excessive fluctuations or depressions in prices" are controlling policies. 12 U.S.C. § 1141(a). The Bank's decision to finance the Embassy purchase specifically rested on findings, required by law, that the loan would further those policies (Gov. Exh. 114, R. 659). It so advised the Assistant Attorney General in charge of the Antitrust Division, Department of Justice, prior to the trial in this case (Gov. Exh. 114, R. 653, 657).

After the acquisition was consummated, it was again brought to the attention of the Department of Agriculture by the Association itself (Def. Exh. 64, R. 737). There, it was reviewed under Section 2 of the Capper-Volstead Act by the Solicitor of the Department, acting on behalf of the Secretary of Agriculture under a formal delegation of authority (Def. Exh. 66, R. 743). The Solicitor then advised the Attorney General that the Department's study of the Embassy acquisition disclosed no violation of the Capper-Volstead Act (Def. Exh. 65, R. 742-3, 413).

At trial, J. Kenneth Samuels, Director of the Marketing Division of the Farmer Cooperative Service (R. 407-433), testified that the Farmer Cooperative Service had, at the Association's request prior to trial,

made yet another study to determine the effect of the Embassy acquisition on the Washington market (R. 409). The study disclosed that retail prices in Washington "were practically the same as other markets in this area and in the vicinity" (R. 414), that producers would be able to sell a greater proportion of their milk "through the Association direct to the consumers" (R. 416), and indicated that the producers who had formerly supplied Embassy would, by joining the Association, "have to share in its disposition of the surplus of the milk" (R. 416). When asked how the acquisition accorded with the policy of the Farmer Cooperative Service, Mr. Samuels replied (R. 416):

> A. This purchase was in line with some of the things that we have been studying with regard to other cooperatives. We have been advising cooperatives and making studies of cooperatives on the feasibility and problems and methods of going into large marketing activities in milk, for instance, in the retail distribution and we feel that this movement on the part of producers here is similar to what is being undertaken by producers in many areas of the country.
>
> Q. Do you consider that this is for the benefit of the consumers?
>
> A. I think it would be a long-run benefit to the consumers and the producers.

But when government counsel, on cross-examination asked (R. 430):

> Q. Mr. Samuels, you also stated that the acquisition of Embassy Dairy by the Defendant Association was in line with what other cooperatives had been doing in other markets in this country. What other markets did you compare and did you study—

the district court on its own motion excluded the question. It took the view that "the mere fact that similar transactions might have been consummated in other markets would not affect the issues of this case" (R. 430).

The salient feature of the Embassy trial was that it was prosecuted by the Department of Justice and decided by the court as an ordinary antitrust case. No consideration was given to the agricultural policies involved, the lending of federal funds, the statutory findings made by the Bank for Cooperatives, the promotional activities of the Farmer Cooperative Service, the relevance of the surplus problem, or the absence of undue enhancement of prices. Where the agricultural agencies favored the purchase because it would tend to raise the blend price received by the farmer, the district court condemned the purchase because without it "prices might have fallen" (R. 493). Where the intent to promote market stability had led federal agricultural agencies to promote the acquisition, that same purpose, being anticompetitive, led the district court to condemn it.

5. The Inapplicability of Antitrust Standards

The findings and conclusions of the district court that the Association's acquisition of Embassy Dairy contravened antitrust standards has not, as such, been appealed to this Court. Rather, the focus of this appeal has been on the error in applying those standards at all. For if the antitrust laws apply, irreconcilable conflict with agricultural law and between coordinate branches of the federal government would be the only possible consequence.

The futility of applying antitrust standards in a farmer cooperative's market was pointed up four months after the district court entered final judgment. On May 26, 1959, the Department of Agriculture issued Federal Marketing Order No. 2 to regulate the handling of milk in the Washington area. 24 Fed. Reg. 4331. This order, applied for by the Association on behalf of its members and issued upon the affirmative vote of the market's producers, was recommended in a decision of the Assistant Secretary of Agriculture on May 1, 1959. 24 Fed. Reg. 3630. That decision concluded that a marketing order would "contribute substantially to the stabilization of the fluid milk market" and effectuate the policy of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, because (24 Fed. Reg. at 3631)

> the loss of Class I outlets, and the extensive price cutting which has prevailed over an extended period, have resulted in increasing market instability, which if continued, may lead to a complete breakdown of the marketing system. This situation constitutes a continuing and serious threat to a dependable supply of pure and wholesome milk for the Washington area.

The parallel in competitive effect between the issuance of the marketing order and the acquisition of Embassy Dairy is striking. Each action flowed from the desire to achieve market stability in the face of an increase in the Association's burden of surplus milk and of competition from out-of-area sources. Compare Gov. Exh. 27, R. 565, with 24 Fed. Reg. at 3631. Just as the acquisition of Embassy was favored by the Department of Agriculture because it would enable more producers to share the surplus burden carried by the Association (R. 416) so did the order recognize that

since the Association "carries the bulk of the necessary surplus of the market," a pooling procedure was warranted "which will provide for an equitable sharing by all producers of the lower returns realized from the handling of this necessary reserve supply of milk." 24 Fed. Reg. at 3643. Each action resulted from affirmative steps taken by the Association under specific statutory authority. And each action rested upon findings by agricultural agencies that competitive conditions warranted government assistance: a federal order in one instance and a federal loan in the other.

The validity of action by producer cooperatives to overcome competitive problems by seeking marketing orders regardless of their tendency to create a monopoly or "ulterior motives of corporate aggrandizement," has been firmly established by this Court's decision in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 559-560 (1939). So too, should the validity of vertical integration by a cooperative to overcome competitive problems be sanctioned by this Court under the Capper-Volstead Act and ensuing agricultural statutes. Any attempt to draw a line between lawful and unlawful anticompetitive acts of a cooperative association of farmers would only invite artful allegations in future antitrust indictments and complaints, thereby marking a return to the oppressive conditions that prompted the 67th Congress to enact Capper-Volstead as an exclusive remedy.

CONCLUSION

For all of the foregoing reasons we respectfully urge that the judgment of the district court in No. 62 be reversed and the judgment in No. 73 be affirmed.

Respectfully submitted,

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November 9, 1959.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellant*

v.

UNITED STATES OF AMERICA

No. 73

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

On Appeal from the United States District Court for the District of Columbia

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APPENDIX

Statutes Involved

1. The Sherman Act: Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. §§ 2 and 3).

Section 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. The Clayton Act: Act of October 15, 1914, 38 Stat. 730, as amended.

Section 6 (15 U.S.C. § 17):

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall

be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 7, as amended, 64 Stat. 1125 (15 U.S.C. § 18):

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

* * *

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in

the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

3. The Capper-Volstead Act: Act of February 18, 1922, 42 Stat. 383 (7 U.S.C. §§ 291, 292).

Section 1:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

Section 2:

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to plead-

ings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

SUMMARY OF LEGISLATIVE HISTORY OF THE CAPPER-VOLSTEAD ACT

1. Introduction

The Capper-Volstead Act is the Act of February 18, 1922, Public Law 146, 67th Congress, Second Session. It is found in 42 Stat. 388, c. 57, and is codified in Title 7, United States Code, Sections 291 and 292. It was originally introduced as H. R. 13931 by Congressman Volstead on May 4, 1920, in the 66th Congress (59 Cong. Rec. 6553). Although a similar bill, S. 4344, was introduced by Senator Capper in the Senate on May 7, 1920 (59 Cong. Rec. 6671), consideration in both chambers was directed to the House bill. It was amended and passed by the House in the Second Session (59 Cong. Rec. 8041) and by the Senate with amendment in the Third Session (60 Cong. Rec. 377). The House disagreed with the Senate amendments (60 Cong. Rec. 570) and the conferees appointed by the two houses were unable to agree prior to adjournment of the 66th Congress.

A slightly modified version of H.R. 13931 was introduced on April 11, 1921, as H.R. 2373 in the First Session of the 67th Congress by Congressman Volstead (61 Cong. Rec. 98). Senator Capper introduced a companion bill, S. 983, on April 19, 1921, but as in the 66th Congress consideration was directed to the House bill (61 Cong. Rec. 424). It passed the House with minor amendments (61 Cong. Rec. 1046). The Senate made some changes but this time rejected the two amendments which had previously caused the bill to fail (62 Cong. Rec. 2048 et seq.). The House agreed to the Senate version (62 Cong. Rec. 2455) and the bill was sent to the President.

2. House Consideration in the 66th Congress

The original text of H.R. 13931 provided in part as follows (59 Cong. Rec. 8023):

> That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, or fruit growers may act together in associations, corporate or otherwise, with or without capital stock in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of their members; and such producers may organize and operate such associations and make the necessary contracts and agreements to effect that purpose, any law to the contrary notwithstanding . . .

The balance of the bill was substantially the same as finally enacted. The bill was reported by the House Judiciary Committee in House Report 939, 66th Congress, Second Session (59 Cong. Rec. 6737). In pertinent part the report (reprinted at 59 Cong. Rec. 8033) stated:

> The object of this bill is to authorize the producers of agricultural products to form associations for the purpose of collectively preparing for market and marketing their products.
>
> Section 1 defines and limits the kind of associations to which the legislation applies. . . . The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provision of this bill . . .
>
> Section 2 makes applicable to these associations in a modified form the provisions of the Clayton Act. Briefly, it gives the Secretary of Agriculture power to prevent these associations from exploiting the public. In the event that any association should refuse to comply with the order of the Secretary, a suit may be brought in the appropriate district court to enforce his order. The farmers are not asking a chance to oppress the public, but insist that they should be given a fair opportunity to meet business conditions as they exist—a condition that is very unfair under the present

law. Wherever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.

While this bill confers on farmers certain privileges, it cannot properly be said to be class legislation. Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it. Instead of granting to farmers a special privilege, it aims to take from the business corporations a special privilege by conferring a like privilege on farm organizations. It is no answer that farmers may acquire the status and secure the rights of a business corporation by deeding their farms to a corporation. That is neither practical nor desirable from any standpoint. Without doing that they cannot associate themselves together for the mutual profit of the members without being threatened with prosecution.

New York, Pennsylvania, Illinois, Wisconsin, Minnesota, and a number of other States have granted the right to form associations such as those contemplated in this bill. But these States can not confer any right upon their organizations to engage in interstate or foreign commerce. This bill is designed to grant that right. Associations of this kind are common in European countries and have been in operation for many years. Their effect has not been to raise prices to the consumer. In many instances the effect has been the reverse. They have tended to prevent much of the

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> gambling in foodstuffs and to eliminate many of the useless middlemen that stand between the producers, the retailers, and the consumers. It is one of the chief problems of these associations to reach the consumer with as little expense as possible. Farmers ought to be given a chance to do that. The high cost of living can not be solved by discouraging agriculture. It must be solved by fair treatment of those engaged in that pursuit. To maintain his self-respect and the dignity of his occupation the farmer must be given an opportunity to deal in selling his products on an equal footing with those who purchase it. He should be given an opportunity to help solve in a rational and fair way the problems involved in the high cost of living.

When H.R. 13931 came up in the House, Representative Morgan of Oklahoma, a member of the Judiciary Committee, was the first spokesman favoring it. Six years earlier, Morgan had been one of the dissenters from the Report on the Clayton Act because he believed that legislation inadequate for the purpose of exemption. Morgan traced the development of cooperatives, stated the exemption provided in Section 6 of the Clayton Act was unfortunately ambiguous, and declared it to be the intention of the proposed bill to make (59 Cong. Rec. 7851-2):

> a broader and more comprehensive declaration as to the kind and character of cooperative farm organizations which shall not be prohibited by the provisions of any of the antitrust laws.

The economic goals of the bill were summed up by Congressman Morgan as follows (59 Cong. Rec. 7852):

> 'Cooperative farmers' organizations will bring producers and consumers closer together. The excessive charges of unnecessary middlemen will be eliminated, and the cost of marketing, manufacturing, and distributing farm products will be greatly reduced. The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. Prices will be stabilized, production will be more uniform and larger in the aggregate, the supply of food products will increase in proportion to

> the demand, speculations, gambling and profiteering in food products will be curtailed, controlled, and, in a large measure prevented, as a result the farmers will be more prosperous, the cost of living will be reduced, and the general public welfare will be benefited.

The purpose to eliminate the middleman through the formation of marketing cooperatives was echoed frequently in the course of debate on the Capper-Volstead Act. See e.g. Congressmen Swope of Kentucky (59 Cong. Rec. 8022); Mann of Illinois (59 Cong. Rec. 8027); Browne of Wisconsin (59 Cong. Rec. 8035).

Representative Walsh of Massachusetts, a member of the Judiciary Committee and one of the opponents of special antitrust treatment of agricultural cooperatives, complained that if the Secretary of Agriculture did not prosecute farmers, nobody could (59 Cong. Rec. 7857):

> Under the provisions of this bill we turn over to the Secretary of Agriculture, the guardian angel of the farmers of this country, the say so as to whether men shall be prosecuted in case they have, through the enhancement of price, lessened competition or restrained trade. That authority now in other industries is vested elsewhere.
>
> Furthermore, there is no provision in this bill for anybody to lodge a complaint or to require an investigation or prosecution.

Representative Cannon similarly complained that if the Secretary of Agriculture sympathized with a cooperative, there would be no remedy for its restraints of trade (59 Cong. Rec. 7858):

> On page 3 I find that on complaint the Secretary of Agriculture may regulate these people, or not regulate them, after investigation; and if they do not obey his mandate for the first time he can resort to the courts. But suppose he be in sympathy with the people that this bill would authorize to associate together, then I do not find that there is any appeal to be made in

that event to any court. He is supreme. Now, then, I want to say that I come from an agricultural State, a large agricultural district. I voted for the rule and I am in sympathy with apt legislation, but I do not want legislation that would shut out any American citizen from appealing for his real or supposed rights.

In a colloquy with Representative Moore of Virginia, Congressman Volstead revealed the source of the language of Section 2 of the Capper-Volstead Act (59 Cong. Rec. 8017):

> Mr. Moore of Virginia. The present law—the Clayton antitrust law—relieves associations of agriculture not having capital stock. Why should we disturb that law; why should not this bill be confined altogether to prospective agricultural associations that are to have capital stock?
>
> Mr. Volstead. Well, personally, I would not have any objection to that, although, as we are granting these associations much larger powers than they had under the Clayton Antitrust Act, it was thought that they ought to be put under some supervision, because there has been complaint against some of these associations, and it was for that reason section 2 was drawn. That section is modeled largely upon some of the provisions of the Clayton Antitrust Act.

The significance of this reference to "some of the provisions of the Clayton Antitrust Act" is discussed in the body of this brief, Part I.

Representative Sabath of Illinois bitterly opposed the bill because of the vicious practices which he believed it would authorize in the milk industry (59 Cong. Rec. 8018):

> You are authorizing the vicious system on the part of the dairymen to sell their milk only to those distributors that will pledge themselves to charge outrageous prices agreed upon months in advance. In fact, if this bill is enacted into law, it will enable the farmers and planters of this country to have the full power to exact any price the combination or organization chooses to charge.

Representative Volstead's observation that cooperatives could be prosecuted if they conspired with outsiders did not satisfy the bill's opponents (59 Cong. Rec. 8021):

> Mr. Volstead. Is it not a fact that these men may be prosecuted for combining or conspiring with any corporation to increase prices?
>
> Mr. Husted. Oh, they can organize just as big an association as they want, and the bill expressly provides that they may fix prices, any law to the contrary notwithstanding. And that includes not only the Sherman Antitrust Act, but the Clayton Act and every other act that in any way, shape, or manner attempts to control prices.

Representative Swope, a proponent of the bill, discussed the remedy provided by Section 2 against those cooperatives which might restrain trade (59 Cong. Rec. 8023):

> Section 2 of the bill to protect the consumer and outlines the remedy in case these organizations should restrain trade or lessen competition. My personal opinion is that the farmers will never abuse the privileges extended to them under this bill; nevertheless I think the committee has acted wisely by staying on the safe side and providing a remedy in case the privilege should be abused.

Representative Donovan of New York, a vigorous opponent of the bill, objected to removing farmers from the jurisdiction of the antitrust laws (59 Cong. Rec. 8027):

> This bill has some very pernicious and un-American features, the chief of which from a legal standpoint, in my opinion, is the one proposing to exempt from the present existing law relating to unfair competition and placing these proposed farmer organizations beyond its jurisdiction.
>
> * * *
>
> The bill proposes to take from the courts the right of initial proceeding, and vest a quasi judicial power in the Secretary of Agriculture, who alone is the one person to determine whether or not a violation in re-

straint of trade or unfair dealing is had, and the steps which ultimately may reach a court proceeding consume 60 days at least, and may, as the law is now drawn, consume even a greater length of time. During all of these preliminary steps which the Secretary of Agriculture alone may employ, the right to enjoin the offending organization of farmers is denied, and even the embargoing of the product of the complained of concern is denied.

* * *

Gentlemen, I believe the purpose of taking the farmer from without the jurisdiction of the antitrust and kindred laws is to avoid the scrutiny and evasion of the standards of cleanliness and the reduction of excessive profits, which the thriving communities and large cities in this country find it necessary to invoke under the law, which at present controls the situation.

Representative Igoe, a member of the Judiciary Committee and floor leader for the opposition, believed that the only legitimate purpose which the pending bill could achieve was removal of the Clayton Act's restriction against capital stock. This goal, he stated, could be attained simply by an amendment to remove the words "without capital stock" from Section 6. But the real purpose of the proponents, Igoe argued, was to permit farmers to form cooperatives which could go out and violate the antitrust laws. His principal example was the case of a milk producer cooperative which under the pending bill would be permitted to dictate to distributors that they sell the cooperative's milk exclusively, or not at all (59 Cong. Rec. 8031):

Here is the proposition: It is not to allow these farmers to cooperate and have capital stock. It is to allow them, after they are incorporated, to go out and do anything which any other corporation or individual can not do. Now, what is the effect of it? Take, for instance, the milk situation in the big cities. These people now have their cooperative associations without capital stock, but if they get this they can violate the laws against unfair trade, and they can go to the

people who deliver the milk and say, "We will sell you our milk, but on condition that you handle our milk exclusively. If you handle any other we will not sell to you." And they can control the prices the distributor may charge. They can say to the distributor, "We will allow you to sell our milk, but you must charge a certain price and give us a certain price." And so the big packers of this country under this law, if they desire to do it, could organize the ranchmen of the country and say to them, "Now, we will distribute your product and make an agreement as your agent to charge a certain price," and under this law they are absolutely free from every law on the statute books—the Sherman Act, the Clayton Act, the laws against unfair competition—and can go out in the country and take from the consumers as much as they want.

Representative Young of Texas opposed giving the Secretary of Agriculture the sole power to determine the destiny of farmers (59 Cong. Rec. 8034):

> Now what does this bill do? Take section 2, where you put your power in one man. If he is a good man, he might not abuse that power; but it is a man that you are reposing upon and intrusting the power to. The Secretary of Agriculture is given the power to determine the proposition as to whether farmers are combining to profiteer in wheat, cotton, or other agricultural products. That is a power that ought not to be put in a governmental agency. It is a safe rule not to vest such a power by statute; and yet you are vesting that power here in the Secretary of Agriculture, a power over the destiny of the farmers of this Nation.

Representative Green of Iowa was one of the few who believed that the bill gave farmers no privilege they did not already possess (59 Cong. Rec. 8034):

> Mr. Speaker, if I construed this bill in the same manner as many Members do, especially as those who oppose it construe it, I should not be inclined to favor it. I do not believe that the provisions of this bill confer upon the farmers any privileges which they did not

> have before. Certainly it does not confer upon any corporation organized by farmers any power which a corporation does not now have and which corporations are every day exercising. The bill gives them the right to organize for the purpose of marketing their products and authority to do any act which is necessary for that purpose. A careful examination of the bill convinces me that beyond that the bill gives them no privileges whatever.

Such statements, by raising the possibility that H.R. 13931 might not be giving farmers all that its sponsors hoped, led Representative Volstead to offer a precautionary amendment:

> At the end of section 2, add the following: *Provided*, That nothing contained in this section shall apply to the organizations or individual members thereof described in section 6 of the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1915, known as the Clayton Act.

In support of the amendment he explained (59 Cong. Rec. 8036):

> The object of the amendment is to preserve to the farmers what rights they now have under the anti-trust act. There is some question whether section 2 might not take away some of the rights which they now have. There is no disposition on my part, and I do not think there was on the part of anyone, to deprive them of existing rights.

The amendment was adopted (59 Cong. Rec. 8037).

Representative Igoe objected to the clause in H.R. 13931 which permitted the making of contracts "any law to the contrary notwithstanding" (59 Cong. Rec. 8038). He also complained that the bill would allow cooperatives to coerce independent producers (59 Cong. Rec. 8039):

> They can go to the farmer, as they did in California, and say "You come in and join us or you can not

> do any business." And if this cooperative association goes to do business with the ultimate salesman or middleman, it can say to him, "You handle our stuff, but nobody else's," and they can put the independent farmer out of business.

Despite such criticism, the House on May 31, 1920, passed H.R. 13931 as amended by a vote of 234 to 58 (59 Cong. Rec. 8040).

3. Senate Consideration in the 66th Congress

H.R. 13931 was reported to the Senate by the Judiciary Committee in Senate Report 655 (66th Cong., 2d Sess.). The Report recommended several amendments to substitute the words "Federal Trade Commission" for "Secretary of Agriculture" in Section 2. In addition the Report proposed an amendment to Section 2 which would insert the following:

> Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, on account of unfair methods of competition in commerce.

The Report's only comment on the bill was that (page 2)

> It was felt by the Committee that it was safer to leave the supervision of associations provided for in the bill in the hands of the Federal Trade Commission than under the jurisdiction of the Secretary of Agriculture, especially as the Commission is already equipped with the requisite machinery to obtain information to carry out the provisions of Section 2 of the bill.

Senator King, a member of the Judiciary Committee who opposed the House bill, opened debate in the Senate by stating that the purpose of the Act was to permit farmers to combine to prepare their products for market, to handle

them, and to process or convert the raw materials into finished products. In addition, he said it provides (60 Cong. Rec. 312)

> that they shall not only be permitted to combine for the purpose of marketing their products, but for the purpose of holding them for an indefinite period in order to secure higher prices, even though such action might constitute a monopoly or restrain trade or be destructive of competition.

King said they could erect warehouses and store products to force higher prices; that they could form factories for the purpose of processing their products and might thus "take the form of monopolies, not only in production but in 'processing,' in handling, and in placing the products, raw or finished, upon the market" (60 Cong. Rec. 312).

He further stated that the bill (60 Cong. 313)

> legalizes combination by the classes mentioned in the bill, that such combinations so legalized may restrain trade and lessen competition; providing, however, that the restraint of trade or the lessening of competition shall not unduly enhance the price of the product, and that if notwithstanding there should be such restraint of trade and lessened or destroyed competition no criminal punishment would result.

Senator Borah, also a member of the Judiciary Committee, stated in capsule form the precise effect of the legislation (60 Cong. Rec. 315):

> [T]his measure . . . gives them a status of their own, fixes a different method of proceeding, and absolutely deprives the court, in the first instance, of examining into the question of whether or not they have violated the law . . . This matter . . . came up before the Senate years ago in the nature of an exemption in specific terms of farmers and laborers from the Sherman Antitrust Law. That has been followed up, and now it is proposed not to exempt them and leave no remedy at all, but to exempt them and provide another tribunal before which they can have their hearings. If

> this measure does not exempt them from the Sherman antitrust law, the farmers themselves are being fooled, because that is what they want.

Senator Overman inquired whether farmers were not already removed from the reach of the Sherman Act by Section 6 of the Clayton Act. Senator Borah replied that the Clayton Act exemption was too indefinite and that farmers "want definite and certain information that the Sherman antitrust law does not operate as to them" (60 Cong. Rec. 316).

Senator King asked (60 Cong. Rec. 373):

> Does the Senator think the bill would exempt from prosecution under the Sherman law any individuals of any association organized under the bill which created a monopoly or developed a monopoly in any of the products referred to in the bill?

Senator Walsh, Chairman of the Judiciary Committee and leader of the opposition to the House bill, replied that it was for that very reason that he had offered the Committee amendment providing:

> Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any association organized hereunder from any proceeding instituted under the Act entitled "an act to supplement existing laws against the restraints and monopolies, and for other purposes" approved October 15, 1914 on account of unfair methods of competition in commerce.

He summarized the purpose of his amendment (60 Cong. Rec. 373):

> If any one of these organizations should resort to any monopolistic practices or attempt to drive any rival out of business or resort to corruption in the case of purely agreements or authority of that kind, they would all be subject to the operation of the Federal Trade Commission Act.

Just prior to passage of H.R. 1393 by the Senate, amendments were adopted (1) to substitute the words "Federal Trade Commission" in every place in which the term Secretary of Agriculture appeared, and (2) to add the "nothing herein" amendment of Senator Walsh as a separate paragraph (60 Cong. Rec. 376-7). Under the Senate version, therefore, the antitrust laws were to remain applicable in their entirety to cooperatives.

As previously indicated, the conferees for the Senate and House were unable to agree on their conflicting bills (60 Cong. Rec. 570). H.R. 13931 thus died with the passing of the 66th Congress.

4. House Consideration in the 67th Congress

H.R. 2373 was introduced by Congressman Volstead on April 11, 1921 (61 Cong. Rec. 98). It was reported in the First Session of the 67th Congress with an amendment on April 26, 1921, by the House Judiciary Committee in House Report 24 (61 Cong. Rec. 687). The Report repeated the analysis made in House Report 939 of the previous Congress. In addition, it stated:

> This bill directs the Secretary of Agriculture to supervise these associations. The reason for that is apparent when one considers the duties and the organization of that department. The Secretary has for many years aided farmers in forming such associations, and his department is thoroughly familiar with the needs and the difficulties under which they always have a struggle. There is in his department a Bureau of Markets that is constantly engaged in studying marketing conditions and prices of agricultural products both in this and foreign countries. As a consequence he is especially well equipped for the purpose of determining whether the prices charged by any of these associations are excessive. That is one of the duties that somebody must perform to safeguard the public.
>
> If it is safe not to place a limit upon the size of an ordinary corporation, there certainly is no reason to

> fear monopoly from farm associations. But in the event that any such association should monopolize or restrain trade so as to unduly enhance the price of any agricultural product ample provision is made in the bill to protect the public. The Secretary of Agriculture in a sundry fashion can grant relief, and he, with his expert knowledge always at hand, can act more expeditiously than could any other agency. In the event an association fails to abide by his judgment it can not only be hailed into court but a temporary injunction can at once be issued against it.
>
> In the event that associations authorized by this bill shall do anything forbidden by the Sherman Anti-trust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.

Because of the extended debate on the bill in the preceding Congress, the debate on H.R. 2373 was brief (61 Cong. Rec. 1032-1046). As stated by Congressman Volstead (61 Cong. Rec. 1033):

> Mr. Speaker, a bill almost identical with it was introduced in the last Congress and passed by more than a two-third majority in this House, and went to the Senate, where it was somewhat amended. There was a disagreement between the House and the Senate, and the bill failed for that reason. I made some slight changes in reintroducing the bill, in order to meet some of the objections that were made in the Senate and otherwise to perfect the measure.

The principal changes from H.R. 13931 of the 66th Congress were deletion of both the "any law to the contrary notwithstanding" language from Section 1 and the Volstead amendment adopted in the previous Congress to exclude Clayton Act cooperatives. In the course of his explanation of the bill, Representative Volstead was careful to point out that (61 Cong. Rec. 1033):

If these organizations should combine with corporations not organized as provided in this bill to thus monopolize or restrain trade, they will become subject to the Sherman Antitrust Act just the same as any other combination or corporation.

Congressman Mills took issue with the House Report insofar as it appeared to limit the bill merely to granting permission for farmers to associate (61 Cong. Rec. 1039):

> But this bill has one other and to my judgment an ever greater defect. It purports, and in the report of the committee it is distinctly stated that it only purports to permit farmers' associations for the purpose of marketing their products and incidentally to economize in the marketing. If that is the purpose of the bill, I think we can all support it.
>
> • • •
>
> But this bill goes much farther than that. The report says that in so far as the terms of the act are concerned, aside from the mere act of forming an association, they do not apply. The report says that the bill does not eliminate those provisions of the Sherman anti-trust law. I beg to differ with that report.
>
> I should like to point out to you gentlemen that the bill permits the formation of these associations and permits the association and their members to make necessary agreements to effect such purposes. Now, what are the purposes referred to? Preparing for market, handling and marketing their products for interstate and foreign commerce. It permits them to make any agreement that they see fit to make. In other words, it permits one of these associations, if necessary, to combine with another interstate association . . . It permits one association, if necessary, to make an agreement with all other existing associations not to sell to a single commission merchant that sells below a certain price. It is possible, if it is the intent of the framers of this bill, to simply permit the formation of an association or corporation for the purpose of marketing, to say specifically in this bill that the other provisions relating to what these associations shall do after they are formed shall be subject to the provisions of the Sherman Antitrust Act.

The role of the Secretary of Agriculture as being primarily responsible for enforcement of the antitrust laws vis-a-vis farmers was brought out again by Congressman Sumners of Texas, a member of the House Judiciary Committee (61 Cong. Rec. 1042):

> This bill is intended to permit farmers to organize and have central selling agencies through which they may operate. I want to say to my friends on this side who are fighting this bill that if you destroy this bill, if the representatives of these agricultural organizations know what they are talking about, you are going to put them up against prosecutions from district attorneys all over this country. Under this bill it is proposed that the Secretary of Agriculture, representing all the people in this country, presumed to be familiar with the problems of agriculture, will be able to cooperate with these agricultural associations, helping them to build a greater strength for themselves; at the same time, when they put the prices up too high, instead of jumping on them and putting their members in jail, in the first instance, he will say to them, "The prices are too high; you have got to back up." And if they do not do so, he will then bring suit in the district court, where the farmers will have the same right to defend as they would have in the event of prosecutions brought in the first place. The judgment, if gotten, will be one of injunction, and not for crime. This may not work, but the farmers want to try it, and the committee has not been able to devise anything better which would have a chance to pass the Senate, and it is doubtful if we can get this by.
>
> * * *
>
> Mr. Lankford. Do you favor section 2 in order to get the bill through?
>
> Mr. Samners of Texas. I favor it because it is necessary to get it through, and there must be some sort of public control. The farmers themselves recognize that. We must not deny the people the necessary power to do the necessary things for fear they may abuse it. The thing to do is to give them the power, and then give the public a chance, too; and that is what this bill does. This is not a perfect bill. It is

> the best we can do. The agricultural situation is desperate, and we ought to do the best we can do and do it now. It is a choice between giving the Secretary of Agriculture, the Department of Commerce, or the Department of Justice original supervision. The farmers prefer the Secretary of Agriculture, and I see no reason why the public should object to his designation.

Congressman Hersey, also a member of the Judiciary Committee, stated that this bill would exempt farmers from the antitrust laws (61 Cong. Rec. 1043):

> Mr. Speaker, this bill exempts farmers' cooperative marketing associations from the provisions of the Sherman antitrust law and the Clayton Antitrust Act.
>
> • • •
>
> The value of such farm organizations to the producers of agricultural products is beyond estimate. By such organizations the farmers of this country can work and think together. It creates a civic force in large farming communities which protects the farmers, both for the present and for the future. They can thereby operate together in buying seed, fertilizer, farm machinery, and everything needed for the conduct of the farm.
>
> They can work and act together in marketing their products, both in the local and in all markets of the world. The small farmer is assisted in his efforts to hold or market his crops. It does away with the middleman, the speculator, and the importer; in brief, it enables the producers to act together for their mutual interests in the planting, care, and marketing of agricultural products.

Just prior to passage of the bill by the House, Congressman Volstead made the point that while the effect of the bill was to remove the threat of criminal prosecution of farmers' organizations, Section 2 would provide a remedy through the Secretary of Agriculture, and that the farmers approved such control. He stated (61 Cong. Rec. 1044):

Section 2 has the entire approval of the farm organizations. It has been submitted to the attorneys for these organizations, and they have expressed not only an entire willingness that it go into the bill, but they have expressed their desire that it remain in the bill. I want this House to understand that whoever votes to strike out section 2 will vote against what the farmers want; and it is perfectly evident to any lawyer that it is an advantage to the farmers to have section 2 in the bill, not only for the reason expressed by the gentleman from Texas [Mr. Sumners] a minute ago, but because in the event that there is a complaint against them they will not be subject to criminal prosecution if their organization is permitted by this bill, but an investigation will be had before the Secretary of Agriculture, who is given power to deal with the matter. Corporations are very seldom indicted but proceeded against in a civil action substantially the same as we authorize against these associations. I have consulted with representatives of the various farm organizations, and the question has been carefully discussed by them and their lawyers, and there is no question but that a man who votes against section 2 votes against what the farmers of this country want. I believe section 2 ought to stay in this bill, not only because they want it, but because without that section the bill would be unfair to the public, and we ought not to pass anything that would be unfair to the public. With that provision in the bill, it seems to me it will give to these organizations a status of equality with other business concerns, and that is all the farmers ask. They will take care of themselves if you will give them that.

* * *

Mr. Sumners of Texas. I want to ask the gentleman from Minnesota if he thinks that without section 2 this bill has any chance to pass the Senate?

Mr. Volstead. I do not think so, and I do not think it ought to.

The bill thereupon passed (61 Cong. Rec. 1046).

5. Senate Consideration in the 67th Congress

H.R. 2373 as amended by the House was referred to the Senate Judiciary Committee (61 Cong. Rec. 1058) and thereafter reported with amendments on July 27, 1921, in Senate Report 236 (61 Cong. Rec. 4332). The Report presented by the Committee's Chairman, Senator Walsh of Montana, proposed deleting Section 2 in its entirety and adding to Section 1 the following amendment:

> Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, on account of unfair methods of competition in commerce.

Explaining the amendment, the Senate Report stated:

> The foregoing is a reproduction of the House bill, omitting therefrom section 2, and adding thereto the provision to guard against the establishment of a monopoly, in substance like the amendment proposed by this committee and adopted by the Senate to a like bill which passed the House at the last session. . . .
>
> The hearings conducted by the subcommittee have confirmed the members thereof in the conviction that the amendment insisted upon by the Senate at the last session is essential for the protection of the consuming public and can do no possible harm to the great body of farmers in whose interest the legislation is demanded.
>
> Inasmuch as it is utterly impossible to establish a monopoly of any of the ordinary farm products, cereals, cotton, livestock, etc., and inhibition of monopoly must be unobjectionable to the producers of such. Moreover, your committee is entirely satisfied that they have no desire or purpose to establish a monopoly. Why anyone should insist, under these circumstances, on the enactment of a law which, in terms, would authorize them to do so, your committee finds it impossible to understand.

It is possible, however, to establish a monopoly with respect to farm products which can be produced profitably only in a very limited area, or in the case of highly perishable products, like milk, which will not stand shipment long distances. It would not be in the public interest, your committee believes, to permit all producers of milk within the area from which one of our great cities is supplied to effect a single organization having thus a monopoly which might or might not be utilized to exact extortionate prices of consumers. Your committee sees no good reason why two, three, a half dozen, or a dozen cooperative associations might not properly be organized for the purpose of supplying a city with its milk, nor why, in the case of raisins, for instance, produced only within a limited area in the State of California, a monopolistic organization should be permitted and encouraged, rather than two or three cooperative associations organized and operating on similar lines.

Section 2 of the House bill has for its purpose the alleviation of the evils of monopoly, or those that may follow from authorized combinations, by the granting of something like supervisory control to the Secretary of Agriculture. It was quite generally understood by the committee when the bill was before it at the last session that this section gave to the Secretary of Agriculture the authority to fix prices. The proponents of this bill, however, repudiate that idea and insist that it is not the proper construction of the bill, and assert that they are resolutely opposed to reposing such power in the Secretary of Agriculture. They assert that the bill gives to the Secretary power to declare that a price charged is unreasonable, but gives him no power to fix what is a reasonable price. It is quite likely that even if he were given power to determine what is a reasonable price the provision would be inoperative, as conditions might so change pending a hearing as that the result arrived at would be eminently unjust so far as prices for the future are concerned. However that may be, the experience of the Interstate Commerce Commission under a similar provision, giving it power to determine what is an unreasonable rate but no power to determine what is a reasonable rate, satisfies your committee that as this

provision is construed by the proponents of the bill, and perhaps correctly, it is utterly valueless. If competition is preserved—that is to say, if no monopoly can exist under the act—regulatory provisions are superfluous.

Debate in the Senate on H.R. 2373 commenced at the beginning of the Second Session of the 67th Congress (62 Cong. Rec. 2048 et seq.). Senator Kellogg, who had been a member of the Judiciary Committee in the 66th Congress, sharply opposed the Committee's attempts to amend the House bill. As floor leader for the House version, he opened the Senate's consideration of H.R. 2373, detailing its history in the prior Congress which had resulted in the disagreement of the two chambers (62 Cong. Rec. 2048-9). He urged the Senate to disagree with the substitute proposed by the Judiciary Committee and to adopt the measure as passed by the House except for an amendment to be offered by Senator Capper. After describing Section 1 of the bill, Kellogg stated (62 Cong. Rec. 2049):

> Now I come to the features for the protection of the public in the event that any restraint of trade or monopoly unduly enhances prices, for, after all, the principal object of the Sherman Act is to prevent great organizations of capital and business from getting control of the business of the country and enhancing prices to the damage of the public.

He outlined the powers which the House bill would give to the Secretary of Agriculture and explained why the Secretary, rather than the Attorney General, should administer the antitrust provisions which would relate to agriculture. His remarks left no question but that the Secretary of Agriculture would be exclusively responsible for initiating antitrust proceedings against farmers (62 Cong. Rec. 2048-2049):

> The first question which has arisen is why the Secretary of Agriculture should be named as the officer to find whether the association has unduly enhanced

prices. I know of no officer more competent to deal with the question than the Secretary of Agriculture. He has in his department a Bureau of Markets. He keeps track of the cost of production, the cost of selling, and what the public is paying. He has the statistics and he; through his Bureau of Markets, can determine better than any other agency of the Government whether such a cooperative marketing association is really being operated in restraint of trade as a monopoly and is unduly enhancing prices.

The Attorney General has the duty placed upon him to take charge of the suit in the court to prosecute it, but the Attorney General has not the machinery to study these cooperative associations, to find out the cost of production, the cost of selling, the reasonable prices to the consumers, and various other elements which it is easy for the Secretary of Agriculture to find out.

It may be said, therefore, that before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly, or not, the Secretary of Agriculture must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices.

The ensuing colloquy made it clear that farmers' cooperatives were to be absolutely immune from antitrust prosecution originated by the Department of Justice (62 Cong. Rec. 2049):

Mr. King. It is intended, then, as I understand the Senator, to make all such organizations absolutely immune from criminal prosecution.

Mr. Kellogg. They are immune from criminal prosecution, and I think they ought to be. I have never known much to be accomplished by criminal prosecution under the Sherman Act; if anything, very little.

Mr. King. It denies the right of the Attorney General to initiate proceedings, even though he should believe from uncontrovertible evidence that a monopoly stupendous in character and oppressive in results

exists by reason of combinations of the character contemplated.

Mr. Kellogg. The Senator understands from the statement I made that the Attorney General can prosecute suits instituted by the Secretary of Agriculture.

Senator Kellogg then went on to state his specific objection to the Senate substitute (62 Cong. Rec. 2050):

> The Senate substitute proposes, therefore, that if there is an attempt to monopolize, or a technical monopoly, whether it has been of benefit to the public or not, if it is a mere technical monopoly, or an attempt to create a monopoly, the association is subject to all the pains and penalties and prosecutions provided for in the Sherman Antitrust Act.

Senator Kellogg addressed himself to the argument that under the House version, without the Senate amendment, some cooperatives might monopolize local commerce. While acknowledging the possibility of this in some agricultural products such as milk, he saw no reason "to hold the sword and the threat of the Sherman Act" over all farmers (62 Cong. Rec. 2053):

> It is claimed, however, that there are some products of local production and sale which might be monopolized, and the monopoly become of great danger to the public. For instance, fluid milk, I believe, can only be shipped economically four or five hundred miles. It is claimed that raisins, which I understand are raised principally in two or three counties in California, can be monopolized by the selling associations of farmers in the counties where the fruit is produced. But, Mr. President, because there are a few products of which the committee feel there is danger of monopolization, they propose to hold the sword and the threat of the Sherman Act over all the farming activities of the country, and subject them to unreasonable prosecution and harassments in order to protect the public in a few articles. This bill furnishes ample protection against undue exactions in those articles which it is claimed may be monopolized.

Senator Capper wholly endorsed Senator Kellogg's analysis (62 Cong. Rec. 2057). He went on to describe the economic realities that would be obliterated by adoption of the Senate amendment (62 Cong. Rec. 2058):

> . . . this proviso nullifies the act, as no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates. Middlemen allege that farmers in selling their products individually are competitors with each other, and that by combining into associations to market collectively such competition is eliminated and the farmers thereby undertake to form a monopoly. Though it is conceded that the inevitable effect of cooperative marketing is to lessen competition between farmers, it nevertheless remains that farmers must market collectively or, in the more correct sense, they can not market at all, but must usually turn over their products to a noncompetitive buyer who operates the only elevator or milk station accessible to the farmers in that locality.
>
> • • •
>
> The bill as it passed the House, and which I hope will have the approval of the Senate, gives to consumers a protection which they do not now have as against middlemen, in that if such farmers' marketing associations unduly enhance prices a complete and adequate remedy is provided in section 2. If such associations unduly enhance prices, the Secretary of Agriculture may order them to cease and desist from monopolizing and restraining trade and commerce. This provision of section 2 is taken from the Federal Trade Commission Act, and the Secretary of Agriculture can, as the Federal Trade Commision has repeatedly done, issue orders to cease and desist from specific acts. But if the bill is enacted into law in the form reported by the committee it will be a trap for the farmers and in no sense a measure of relief.

Senator Walsh, chairman of the Senate Judiciary Committee, told his colleagues that the only substantial difference between the Senate and House versions was

"whether we should authorize . . . the creation of or the attempt to create a monopoly" (62 Cong. Rec. 2122-3):

> The question as to where the revisory authority should be placed was not a matter of very serious consideration. The bill went to conference, and the conference was unable to agree, the Senate conferees insisting upon that amendment proposed by them, to the effect that nothing in the act was to be deemed to authorize the creation of or the attempt to create a monopoly, and that, Mr. President, is the only substantial difference now, the only real subject of contention between the bill as it passed the House and now before us, and the Senate substitute, namely, whether we should authorize, under the protection of this act, the creation of or the attempt to create a monopoly in the products to which the bill refers . . .
>
> So that the sole matter of difference—in substance, the sole question for determination—is the question as to whether we shall authorize the setting up of monopolies under the protection of this bill. That is the one question for the Senate to determine.
>
> The Senate committee insists that we shall not authorize that to be done. I understand the position of Senators on the other side to be that we shall, and that is a plain statement of the issue between us.
>
> Mr. Pomerene. Mr. President, am I right in this, then, that the difference between the two is that under the House bill, if I understand the Senator correctly, there may be a monopoly, but subject to regulation—
>
> Mr. Walsh of Montana. Exactly.
>
> Mr. Pomerene. And under the Senate Committee bill there may be a monopoly, but without any regulation.
>
> Mr. Walsh of Montana. No; the Senate committee bill forbids monopoly utterly.
>
> Mr. McNary. I agree with very much that has been said by the distinguished Senator from Montana, but in view of the provisions in the Senate committee amendment which the Senator has just read, may I inquire what rights are given to these associations that they do not now have under existing law?

Mr. Walsh of Montana. . . . The Sherman Act in its important provisions deals with two problems. It penalizes two different things. Section 1 of the Sherman Act forbids any combination, contract, or conspiracy in restraint of trade. Section 2 forbids monopolies and penalized monopolies wherever they may exist. . . .

The answer to the Senator from Oregon is that it is our purpose to relieve these associations from all possible risk of being prosecuted under section 1 of the act, but not under Section 2.

Senator Walsh indicated that his fear of monopoly was confined to products "produced only within limited areas" and which had to be consumed within a limited distance from their place of production. Milk was his prime example (62 Cong. Rec. 2156):

Mr. President, at the last session of the Senate I pointed out that the only substantial difference between the House bill and the Senate bill arises over the question of whether the Congress shall expressly authorize the establishment of monopolies under the protection of the statute which it is proposed to enact; also that a limitation of the scope of the act so as to exclude the organization of monopolies is a feature that is of no consequence whatever to the producer of the ordinary line of farm products. A provision of that kind could not possibly affect him in any way whatever. The grower of grain, the grower of cotton, and the producer of potatoes would look with entire indifference upon a provision of that character. It would affect only those articles which are not widespread in the territory in which they are produced; articles that are produced only within limited areas, like raisins, or commodities that will not stand shipment, like milk, that must be produced within a limited distance from the centers in which they are consumed. To those people and with reference to those products the provision which gives rise to the difference between the two Houses, the prohibition of monopoly, is a matter of very great consequence as, in my judgment, it is to the consumers of those products throughout the country.

Senator Walsh went on to state that (62 Cong. Rec. 2156):

> both bills would authorize the organization of associations among farmers to make butter of their product or to make cheese of their product or to make condensed milk of their product, and to put the product on the market.

Senator Pomerene expressed grave concern lest the authorization of cooperative marketing without Sherman Act inhibitions might (62 Cong Rec. 2157):

> to use an extreme and impossible case in order to illustrate what is in my mind . . . raise the price of milk to 25 or 30 cents a quart under a combination.

Senator Walsh replied:

> Mr. President, that is the matter to which I am endeavoring to challenge the attention of the Senate—the possibility of the organization of combinations under this bill, entirely monopolistic in character, which would exact such prices from the consumers, particularly of milk, as to bring the whole movement for cooperative marketing into disfavor and disrepute and have such a corrosive effect as to wipe out any statute that we may enact in relation to the subject.
>
> Now, Mr. President, I want to call attention to the fact that the only people who came before the committee in relation to this bill, other than the representatives of the farm organizations in the city, were representatives of the California Raisin Growers' Association, a confessed monopoly, and the representatives of the milk producers' associations, who frankly stated their purpose to set up a monopoly of the supply of milk to the great cities of the country under the provisions of this bill, if they shall be permitted so to do.

Senator Walsh quoted extensively from the hearings on the bill. His point was that monopolistic organizations were expressly contemplated by the proponents as being "to the advantage of the general public." Expressly discussed was the "hypothetical" example of a cooperative

formed by all of the milk producers in Virginia and all of the milk producers in Maryland, who would "combine and eliminate all competition" (62 Cong. Rec. 2157-2158):

Mr. Walsh of Montana. I read from page 39 of the hearings:

"Senator Walsh of Montana. Just before you go to that, Mr. Lindsay, will you give us some concrete case in which, in your judgment, it would be advisable in the public interest to permit the creation of a monopoly under this bill."

He was arguing that a monopolistic organization under this bill would be to the advantage of the general public.

* * *

Mr. Lindsay. Take, for instance, the milk producers of a certain district.

Senator Walsh of Montana. Take the country tributary to the city of Washington, for instance.

Mr. Lindsay. Yes; the country tributary to the city of Washington. Of course, there can be no object in people associating themselves together unless it is going to be in some way for their benefit. Suppose the milk producers of the city of Washington, in the District of Columbia, deeming it to be for their best interests and for their benefit, form themselves into an association in which they all join, in order to regulate, we will say, the milk industry here. I can not go into the details of how they would be benefited by different methods of regulation. It might have to do with the sanitary conditions surrounding the milk.

Senator Walsh of Montana. Let us take the thing in a practical way. The states tributary are Maryland and Virginia?

Mr. Lindsay. Yes.

Senator Walsh of Montana. We had a witness before us here who told us that the milk producers in Virginia marketing their product in Washington have an association. It is a mere voluntary association for consultation and conference. They do not handle

their product at all. Each of them sells his product to distributors in the city here, of whom there are several. But let us assume that they do not like that system, and they extend their organization so that all of the milk producers over in Virginia may join in an association and they set up a central agency here for the distribution of their entire product and distribute the avails after the manner of your association or the California Fruit Growers' Association.

Mr. Lindsay. Yes, sir.

Senator Walsh of Montana. Over here in Maryland they have another organization of the same character, of the milk producers in Maryland marketing their product in the city of Washington. These two organizations are here competing in the District of Columbia; the Maryland organization has its central distributing point and the Virginia organization has its central distributing point; and the two are competing.

Now, however, they combine and eliminate all competition, so that the consumers of milk in the city of Washington have just one association from which they can supply themselves. What I want to know from you is how the public is benefited by permitting these two associations thus to combine.

Mr. Lindsay. Unless, in the wisdom of the Congress, the general interests of the public as a whole, both the producer and the consumer, may be advanced by the passage of a law like this, then it should not be passed.

In response to questioning, Senator Walsh expressed outrage at the prevailing high milk prices (62 Cong. Rec. 2159):

Mr. Jones of New Mexico. I ask the Senator if the statement which he has just read to us does not indicate that there is either a monopoly or some gentlemen's agreement which enables the distributors of milk in the city of Washington to keep up the present prices, and to make the large profits which he has just recounted to us?

Mr. Walsh of Montana. I dare say it points to that conclusion. I refer to it simply for the purpose of

showing that outrageous exactions might be made through the organization of such an association as the Senate substitute seeks to prevent, and the advocates of the bill as it passed the House insist should be permitted to operate.

Senator Walsh's objection to the House bill was that it would entirely immunize monopolies except where they unduly enhanced prices, in which limited circumstance the Secretary of Agriculture would have jurisdiction (62 Cong. Rec. 2161):

> Mr. President, I hope that the Senators who are following the discussion will consider this provision, first, as it applies to the case of a monopoly; and, second, as it applies to undue restraint of trade, each of them enhancing prices. It will be observed that by the express terms of the bill the monopoly is entirely immune; it is allowed to go on without any let or hindrance at all unless it unduly enhances prices, in which case it may be hailed before the Secretary of Agriculture. When it is brought before the Secretary of Agriculture, what does the Secretary of Agriculture do? He finds that it is a monopoly, we will say, for the purpose of the discussion, and he finds that it unduly enhances prices.

Senator King questioned the application of the bill to a situation in which the milk producers of Maryland and Virginia would combine into one organization but, because of the availability of milk from other states, would not technically be a monopoly. Senator Walsh replied that under the Senate bill this would amount to a prohibited monopoly because of the fact that milk markets are generally coextensive with large population centers, and the availability of outside milk is of negligible importance (62 Cong. Rec. 2163):

> Mr. King. Mr. President, it is obvious that there would not be a monopoly in, perhaps, the technical sense if the milk producers of Maryland and the milk producers of Virginia were furnishing the city of

Washington with milk and they combined, because there would be West Virginia and Pennsylvania and Ohio and other places remote from Washington to which resort might be had; but, of course, by the time they got the milk here it would make the price so high that it would give to the Virginia and the Maryland milk producers a monopoly.

Mr. Walsh of Montana. Exactly; and then a practical monopoly would exist, which would be in violation of the law. Of course, everybody will appreciate that as far as milk is concerned you can consider that there is a certain basin around each great center of population, from which basin the milk naturally flows into that center, and if you organize all the producers within that basin into one body, then you have a monopoly of the supply, even though by some extraordinary effort you can induce some of the farmers residing beyond that to bring their milk into the center which is thus monopolized. Of course, naturally they belong in the basin of some other city. They have their association there, and it would be difficult to break their business ties and business associations to bring them in. Mr. Miller suggested that it could flow in freely from the outside country. It will not flow in freely from the outside country, because they already have their business ties and business associations, which will prevent the flow.

Senator Walsh explained how even under the Senate bill, with its Sherman Act limitations on monopoly, cooperatives could perform the functions of processing and distribution which middlemen or corporations now performed (62 Cong. Rec. 2163):

That is just exactly what we want to do by this. We want to allow a lot of farmers, instead of bringing their milk into a cheese factory run by private capital, selling their milk to the corporation which runs that cheese factory, to be permitted to associate themselves together—which, of course, would eliminate competition between themselves—build their own cheese factory, bring their milk to that cheese factory, sell the cheese, and divide the profits. That is what this bill

is for. It is urged that you can not do that because Jones, who is now selling milk to the cheese factory owned by a private individual, competes with Smith, who sells his milk to the cheese factory, and competes with Robinson, who sells his milk to the cheese factory, and if these three men combine they eliminate competition between themselves, and therefore they fall under the condemnation of section 1 of the Sherman Act. Does the Senator want to prevent them from doing that?

Mr. King. No.

The debate then returned to the critical issue of monoply (62 Cong. Rec. 2164-6):

Mr. Walsh of Montana. Of course, monopolies as a usual thing are created by combinations, two or more or half a dozen corporations uniting in one, and they establish themselves as a monopoly by unfair methods of competition. Of course, if these associations shall practice unfair methods of competition for the purpose of driving their competitors out of business I daresay they would still be amenable to discipline under the Federal Trade Commission act; at least I hope so.

But, Mr. President, that is not the situation which presents itself at all. The Federal Trade Commission will take care of all these unfair methods of competition by its processes. But I want Senators to face the situation. Let us turn again to the milk producers in the State of Virginia and in the State of Maryland. They do not resort to any unfair practices at all. They simply organize themselves, and they all unite in one association under the protection of this act; they set up their own distributing system in the city of Washington.

Of course, the private distributors must go out of business. They can not any more get any milk from anybody, at least unless they go beyond the territory which would ordinarily supply the city of Washington, and, of course, they must compete under disadvantageous circumstances, and they would naturally fall. So the association does not resort to unfair practices at all, but it gets every man who is supplying milk naturally to the city of Washington into one associa-

> tion, and then it charges an unreasonable price, and the Secretary of Agriculture finds that the monopoly exists, and that it has unduly enhanced prices. What is he going to do? According to the contention they make he can not fix the price at which that association shall sell its milk. They are commanded to desist therefrom. What can he do?

After some confused discussion about the Secretary of Agriculture's price fixing power, the issue came into focus (62 Cong. Rec. 2167-68):

> Mr. Cummins. The Senator from Minnesota suggested, as I recall his observation, that after the Secretary of Agriculture acted under section 2, the Sherman law would be in full force as to that corporation or association. I do not quite understand that. If I correctly interpret the decisions, as well as the law itself, restraint of trade is unlawful, no matter whether it increased or decreases prices. Monopoly is unlawful, no matter whether its effect may be to increase or decrease prices. Does the Senator from Minnesota mean to say that the Sherman law, then, could be applied in its full force to a corporatoin condemned by the Secretary of Agriculture?
>
> Mr. Kellogg. No; I did not say so. I said that if the Secretary of Agriculture found that the restraint of trade and the monopoly had gone to such an extent that the price of agricultural products was unduly enhanced, he could make an order against the restraint of trade and the monopoly, and if he brought a suit to enforce that, the court could apply any remedy against that particular monopoly and restraint of trade that it could now apply under the Sherman Act—that is, in the same form. To make that perfectly clear, the Senator from Kansas [Mr. Capper] offered an amendment, on page 3, line 13, of the bill, to insert, after the word "order," the following:
>
> "Or enter such other decree as the court may deem equitable."[1]

[1] The amendment was subsequently adopted by voice vote (62 Cong. Rec. 2275-6).

I think that is what the bill means anyway. In other words, the court would not be limited to compelling anybody to reduce a price.

* * *

. . . it can restrain the acts of undue restraint of trade or any of the acts in which the corporation may be engaged which have unduly enhanced the price. For instance, the corporation may have made contracts with all of its customers or with all of its members that they would sell only at such a price. That price may constitute, with the other acts, a monopoly. The court may make an order against the contracts, or it may give any relief in the premises that it thinks proper.

Mr. Cummins. Does the Senator think the Secretary of Agriculture can do that also?

Mr. Kellogg. The Secretary of Agriculture can make the order against it. He can not, of course, enforce it. The court must do that.

Senator Walsh concluded the discussion by urging that the issue of price fixing be eliminated by making the bill flatly prohibit monopolies rather than merely forbidding those that unduly enhanced prices (62 Cong. Rec. 2168):

In other words, I insist, Mr. President, that there is no occasion whatever for reposing this extraordinary power, this unusual power, in the Secretary of Agriculture or in any other official or body. Just cut out the matter of monopoly and it will be taken care of. Let them organize and let them form their associations without any peril at all, just so long as they do not attempt to monopolize the products.

Senator Sterling, a member of the Judiciary Committee, criticized the Senate substitute because it would no nothing more than invite prosecution of farmers for monopolizing or attempting to monopolize. In his view, the same evidence which could be adduced under a charge of combination or conspiracy in restraint of trade could also be adduced in support of a charge of monopoly or attempt. Hence the Senate substitute would undo the whole purpose

of exempting farmers from antitrust prosecution (62 Cong. Rec. 2218):

> Mr. Sterling. What does the substitute do? The first part of it, of course, is practically the same as part of section 2 of the original House bill, but the rest of it, that which provides that nothing herein shall be construed to exempt from procedure as for a violation of the law against monopoly—such is the substance of it—upon its face invites a prosecution as for the offense of monopolizing or attempting to monopolize. Ambitious United States district attorneys or persons envious of or feeling that their business might possibly be injured by a company or an association of farmers would be quick to seize upon section 2 of the Sherman Antitrust Act for the purpose of instituting a prosecution . . . Hence my reason for saying, as I said at the beginning, that the same evidence to be adduced in a charge that there has been a combination or contract or conspiracy in restraint of trade may be adduced in support of a charge that there is a monopoly or that there has been an attempt to monopolize. I think we can see the evil now of adopting the proposed substitute, which is ostensibly for the purpose of preventing monopoly. A man who desires to prosecute a combination or association of farmers has only to say, "There is here an attempt to create a monopoly" and he produces the evidence; and he would have produced the same kind and class of evidence had the charge been that there had been an agreement in restraint of trade and commerce

Senator Walsh offered a two part amendment to the House bill which would have required a cooperative to admit any qualified person to membership and in addition would forbid an association from dealing in the products of nonmembers to an amount greater than is handled for members. He explained (62 Cong. Rec. 2267-8):

> Senators will bear in mind that the bill as they are asked to give it their approval authorizes the farmers to go so far with their organization and to get so many producers in it as to constitute a monopoly of the particular product in which they are interested, so that all

other producers of that particular community will be obliged to leave the field. As in the case of the raisin growers, those who are left outside of the monopolistic organization may constitute a mere modicum and they will have no way of getting their products on the market at all. If they do not want to organize a separate association or if they are so few in number that they can not do so profitably they ought to be permitted to come into the monopolistic organization upon exactly the same terms as their neighbors are admitted to membership. It ought not to be placed in the power of this monopolistic organization to drive out of existence and out of the business in which they are engaged the men who do not happen to come in until the association embraces a sufficient membership to constitute a monopoly of the business. It should be borne in mind, Mr. President, that it is proposed to give them the power to organize until they have a sufficient membership to enable them to control the market and have no competitor whatever. Of course, if they care to exercise the power, then they can kill off every other man who is engaged in the same business and who has to market in the same place.

The first part of the amendment was rejected (62 Cong. Rec. 2268) while the second was adopted (62 Cong. Rec. 2269).

Senator Lenroot then offered an amendment to resolve any ambiguity as to the scope of the order to be issued by the Secretary of Agriculture. H.R. 2373 had stated that after a finding of monopolization and enhanced price, the Secretary could order the cooperative "to cease and desist therefrom." The Lenroot amendment proposed striking the word "therefrom" and inserting "from monopolization or restraint of trade." He explained (62 Cong. Rec. 2269):

> . . If this amendment is adopted, this result will follow: If the Secretary of Agriculture finds that there is a monopolization or restraint of trade, and also an undue enhancement of price, then under the bill as it would read if amended he is directed to issue an order, not against the undue enhancement of price, but against

> the monopolization or restraint of trade. In other words, when these facts exist the order goes against the monopoly, against the restraint of trade, and the command will be that they must desist from such monopolization or restraint of trade; and a mere abandonment of the undue enhancement of price will not be a defense.

To Senator Norris' objection that an order against monopolization might cause dissolution of the cooperative, Senator Lenroot observed (62 Cong. Rec. 2270):

> But Mr. President, if a monopoly should exist in such cases, and if that monopoly be used for evil instead of for good, why should not the order go against the monopoly? That is the whole question.
>
> So long as that monopoly is not using its power to the public injury it will not be disturbed, but if it does use its power to the public injury, it ought not to be a defense for that monopoly to say, "We will cease charging this particular sum or price for our products, but our monopoly can continue."

The amendment was agreed to (62 Cong. Rec. 2271).

The Senate then turned to a consideration of the Walsh amendment, the committee substitute for Section 2 of the House bill, Senator King, supporting the substitute, thought that the kind of of agricultural conduct which the Justice Department had been prosecuting ought not be legalized (62 Cong. Rec. 2276):

> I have made inquiry and am advised by the Department of Justice that only four prosecutions have been instituted under the Sherman antitrust law against what might be denominated agriculturists, and in each case there was a flagrant attempt to monopolize and to oppress the people.
>
> In the four cases just referred to the defendants sought to create corners or oppressive trusts; their conduct merited condemnation at the hands of the public and punishment under the law. If they had merely sought to associate themselves together for

the purpose indicated by the pending bill, they would not have been prosecuted. Indeed, as I construe the Sherman antitrust law, they would not have been subject to prosecution if they had sought only to do what the present bill authorizes.

When the question of an interstate association of milk producers recurred, a proponent of the House bill urged that the milk supply of a large city "ought to be monopolized just like the gas supply" (62 Cong. Rec. 2277):

Mr. King. Does the Senator think it would be a wise thing for all of the milk producers of one State or a given number of States to be permitted to combine?

Mr. Hitchcock. When it comes to the milk production, the only possible danger that can be considered is of a local monopoly, a local monopoly in any town. My judgment is that the supply of milk of a big city ought to be monopolized just like the gas supply, and its price ought to be in some way controlled. I believe it could be controlled. When I wake up in the morning and hear half a dozen milk carts rattling by my house, I say that is a waste. It would be better to have one milk cart attending to that part of town. One of the reasons why the cost of living is so great in a city is the awful waste of having hundreds of grocery stores doing what a few should do, dozens of milk men doing what a few could do, and every block paraded by half a dozen different ice wagons and milk wagons and supply wagons, so the people who live in that block have to pay that cost of delivery.

The Senate then considered the question of whether the Secretary of Agriculture or the Federal Trade Commission should supervise cooperatives (62 Cong. Rec. 2278):

Mr. King. . . . May I inquire further of the Senator from Montana, or the Senator from Minnesota, what reason there is for selecting the Secretary of Agriculture instead of the Federal Trade Commission as the depositary of the power to enforce the act?

Mr. Kellogg. Mr. President, I explained my views fully in the speech I delivered in the Senate some days

ago. The Secretary of Agriculture has in his department a Bureau of Markets; he has the statistics; he keeps track of market conditions and costs, and has the information before him all the time. The Trade Commission simply makes an investigation of particular cases.

Senator Norris gave his views as to who should supervise (62 Cong. Rec. 2278):

> I have always believed, I will say to the Senator, that the Federal Trade Commission is better equipped to discharge these duties than is the Secretary of Agriculture. The committee, however, thought otherwise, and they may be right. Those who are behind the bill felt differently; they wanted the power reposed in the Secretary of Agriculture. Personally I am of the opinion that the bill would have been stronger if the authority had been reposed in the Federal Trade Commission; but it is not, in my judgment, a question of any very great importance. Some instrumentality, it was thought, must be given the power to carry out the provisions of the bill, and it seems very appropriate to give it to the Secretary of Agriculture in the first instance, with an appeal to the courts. I do not think it is vital at all.

Senator King argued strenuously for giving the regulation of monopoly to the Federal Trade Commission which, he said, could have access to the same market reports available to the Secretary of Agriculture. Then he said (62 Cong. Rec. 2279):

> I shall move to amend by striking out, in line 9, page 2, the words "Secretary of Agriculture" and inserting "Federal Trade Commission," so that it will read:
>
> "That if the Federal Trade Commission shall have reason to believe that any such association monopolizes—"

The amendment was rejected by voice vote (62 Cong. Rec. 2279).

Just prior to the vote on his substitute, Senator Walsh warned again that its rejection would pave the way for uninhibited milk monopolies, controlled in no respect save as to exorbitant prices (62 Cong. Rec. 2279):

> Mr. Walsh of Montana. I wish it to be thoroughly understood, as we proceed to vote, that to reject the Senate substitute and to adopt the House text will be to remove the inhibition from setting up any milk monopoly in any one of the great cities of the country, and with no check upon anything they may do in the way of exacting exorbitant prices from consumers, except as it is provided in section 2 of the bill, the validity of which is open to most serious question. . . .

The vote on the Walsh substitute "was announced—yeas 5, nays 56" (62 Cong. Rec. 2281). Thus the Senate emphatically rejected its own Judiciary Committee's version which would have retained the Sherman and Clayton Act prohibitions and would have granted jurisdiction to the Federal Trade Commission for enforcement.

6. Final Passage by the House

H.R. 2373 was returned to the House with minor Senate amendments. Representative Volstead explained that the Senate amendments made no change in the bill "as we intended to pass it in the House." He then made a final observation on the legislation and its tortuous path through Congress (62 Cong. Rec. 2453):

> In connection with what I desire to say in regard to this legislation, I may be permitted to offer some observations on legislation that this Congress has passed in the interest of agriculture, and to emphasize the need of that industry for relief.
>
> In this industrial depression it has been noticed that the more thoroughly an industry is organized the less it has suffered and the less its prices have been deflated. This was noticeable in the dairy industry, which is more largely controlled by cooperative farm organization than any other branch of industry except

that of certain fruit growers. Milk, cream, and butter have maintained a much higher average of prices than many other farm products. In this country, until within the last few years, farmers have made but little effort to combine, though those with whom they have had to deal are combined in large corporations. At the beginning of the last Congress a bill was introduced for the purpose of giving to the farmers the privilege of combining, so that they might offer their products in cooperation with each other. Hearings were held by the Judiciary Committee, of which I have the honor of being chairman, but the bill failed to receive the necessary support. After consulting with officers of various farm organizations so as to get their views, I drafted a bill which, after being approved by those officers, I introduced and succeeded in passing in the House, but it was so amended in the Senate that in my view it would defeat its purpose, and it consequently failed of passage at that time. I again introduced this bill in the early part of the first session of this Congress and then secured its passage in the House. It has been pending in the Senate for many months. The Senate again sought to amend it, and a prolonged fight was provoked over those amendments.

The House concurred in the Senate amendments and the bill passed by a vote of 276 to 8 (62 Cong. Rec. 2455). Capper-Volstead thereafter became law.